By the same Author.

All the Common Law Procedure Acts, and all the Acts and Rules relating to Trials of Issues of Fact.

THE COMMON LAW PROCEDURE ACTS OF 1852, 1854, AND 1860.

With Notes, and the Forms and Rules. To which are prefixed or appended all the Acts (or portions of Acts) relating to Common Law Procedure, or the Trial of Issues of Fact in the Courts of Common Law, Chancery, or Probate, with the Rules of each Court respectively. Adapted to the use of Practitioners in all the Courts. By W. F. FINLASON, Esq., of the Middle Temple, Barrister-at-Law, Editor of "The Common Law Procedure Acts, 1852 and 1854."

London: STEVENS & SONS, No. 26, Bell Yard, Lincoln's Inn.

CROWN AND NISI PRIUS CASES,

IN ALL THE COURTS,

For the Ten Years from 1856 to 1866: With Notes to the more important Cases, elucidating the Law, and collecting the Authorities on the subjects to which they relate. In Four Volumes. Edited, and chiefly reported by W. F. FINLASON, Esq., of the Middle Temple, Barrister-at-Law.

London: STEVENS & SONS, 26, Bell Yard; SWEET; and MAXWELL.

A TREATISE UPON MARTIAL LAW:

As allowed by the Law of England in time of Rebellion: With Illustrations Drawn from the Official Documents in the Jamaica Case; and Comments, Constitutional and Legal (with reference to civil and criminal responsibility for acts done in execution of Martial Law). By W. F. FINLASON, Esq., of the Middle Temple.

London: STEVENS & SONS, 26, Bell Yard, Lincoln's Inn.

CONSIDERATIONS

UPON

MARTIAL LAW.

INTRODUCTION.

FROM times coeval with the very origin of our liberties, there has come down to us the doctrine, that in time of rebellion the Crown might, for the restoration of peace, declare war, and exercise its severities, against rebels. This right or prerogative of the Crown was admitted, even by the authors of the great charters, at the very time they were affirmed and upheld, and it was indirectly, but distinctly recognised by the high court of Parliament in a judicial decision (*a*), which declared its exercise illegal in time of peace. It was exercised on every occasion of insurrection which occurred in our annals, without either any statute to authorise it, or any act of indemnity to legalize it, except that in one instance, on account of dreadful excesses, an indemnity was deemed necessary: an exception which only serves to prove the rule. The exercise of this right is described, under the name of martial law, by all historians, and by one so accurate as Lord Bacon, who was a lawyer as well as an historian; and

(*a*) The case of Thomas of Lancaster, in which Parliament declared the execution illegal, because it was in time of peace (in tempore pacis); and both Coke and Hale cite this as a case of martial law. The Lord Chief Justice in citing the case, omits the material words, "in tempore pacis," which Coke and Hale point out as the ground of the decision.

there ch show that he was aware tha
exercis suppression of rebellion, was
doubtedly ime, indeed, this was lost
of, and it ed, by commission, fo
punishment a all ordinary offence
ordinary times. ary the Petition of
to be illegal (*a*), bu s of the petition,
mmentators up

which the Crown is abso
England in time of rebellion. It is true that, as at
mon law, an army would be illegal, except in time of

(*a*) The petition recited that certain commissions had issued with
to proceed according to the justice of martial law, against such soldi
other dissolute persons, as should commit any robbery, felony, muti
other misdemeanour; and by such summary course and order as is
able to martial law, and is used by armies in time of war, to proc
their trial and execution according to martial law; and enacted tha
after no commissions of *the like nature* may issue forth to any p
whatever to be executed as aforesaid, lest by colour of them any be
death contrary to the laws of the realm. Hale's view of the mean
this is, that martial law is not permitted in time of peace, and that
view embodied in the recital in every Mutiny Act since the Revolutio
affirmed by Hallam, vol. i. p. 240.

(*b*) "*Martial Law.*—The law of war, that depends upon the jus
arbitrary power and pleasure of the king, or his lieutenant; for thoug
king doth not make any laws but by common consent in Parliamen
in time of war, by reason of the necessity of it, to guard against da
that often arise. he useth absolute power, so that his word is a law" (*Sm
Repub. Ang.*, l . 4). This is cited in *Blount's Law Dictionary*,
1670; in *Cow tionary*, ed. 1727; and in *Jacobs*, and in *Tomlin*
1835. It is al d in substance into American works (*vide Bu
Law Dictionar rk ed., 1851, in which there is the following,
the head of "*Mart* of rules for the government of an
or *adopted in times of da* arbitrary kind of law or rule,
times established in a place or district occupied or controlled by an
force, by which the civil authority and the ordinary administration
law are either wholly suspended or subjected to military power."

and therefore there were no soldiers but in time of war, so under the name of martial law, which means literally the *law of war* (*a*), originally were included, not only that, but also the rules established for the government of the army as a military body, and which would more properly be called military law, extended to all the offences of soldiers; and that led to an apparent ambiguity, for military law, of course, in its nature, is only applicable to soldiers. But when a standing army was established, and this regular military law was enacted by statute, the other,

(*a*) It is so defined in old books, from its evident etymology, whereas military law is, it is equally evident, in an etymological sense, the law of an army. When there were no soldiers but in time of war, the first of course embraced the second; and as this was so in Lord Hale's time, he uses the term martial law in that double sense, and, in a passage cited by the Lord Chief Justice, says it is no law, but something indulged, and indulged only to extend to the members of the army, *or to those of the opposite army*, and not to others, even though it were a time of war; and that its exercise was not allowed in time of peace, which he says was in substance declared by the Petition of Right. But as regarded soldiers, it applied to all their offences. Then (as explained in the case of *Grant* v. *Gould*, 2 Henry Blackstone's Rep.), when our army was allowed in time of peace, martial law, in the sense of regular military law, ceased, except as embodied and enacted in the Mutiny Act, and was allowed only as regarded military offences, and not as regarded ordinary offences (*ibid*). Therefore martial law became in time of peace, and for ordinary offences, exploded, as any part of our constitution, and remained only as the law of war. And accordingly that case is cited in *MacArthur on Court Martial*, as showing the distinction between martial law and military law. We find that, when the great commentator wrote, all ambiguity had been removed; and thus he wrote of martial law: "Martial law is built on no settled principles, but is entirely arbitrary in its decisions, and is not indeed law, but something indulged rather than allowed as law: a temporary excrescence bred out of the distemper of the State, and not any part of the permanent and perpetual laws of the kingdom, and therefore ... not to be permitted in time of peace." And therefore, he goes ... the execution of Thomas of Lancaster was declared illegal, *because ... in time of peace*, and it was laid down, that if a lieutenant ... in time of peace by martial law, it is murder," ... time of peace ... Coke, in whose time soldiers were raised for actual war ... *Blackstone's Commentaries*, ed. 1800, p. 413). The Lord Chief Justice thinks these passages only refer to soldiers; but this is not the ground given by Parliament, by Coke, by Hale, or by Blackstone. This passage is commented upon in *Tytler*,

which martial law proper, was understood as, in its proper sense, the law of war alone, and as absolute military rule; and at the time our great commentator wrote, was thus explained and elucidated as undoubted law; and from that time to the present has been so laid down, in all books of civil or military law. After the era of the Revolution, it is true that the exercise of this prerogative, at all events, in its fulness, never arose in this country, by reason, as Hallam observes, of our standing army; but in Ireland, where the common law is the same, and where the necessity for martial law has unhappily arisen almost within living memory, it was exercised, without any statute to authorise it (*a*); and although, by reason of horrible excesses, bills of indemnity were required, and in several instances, as those of Wolfe Tone, Mr. Wright, and Mr. Grogan, its exercise after the rebellion was over, or in districts where it had never been, and where, in fact, martial law did not exist, was undoubtedly illegal: yet even, when after the Union the Imperial Parliament thought fit permanently to regulate the subject, it not only did not negative the prerogative of the Crown to declare martial law, but distinctly declared it, and carried it further, providing for its exercise not only in cases of actual, but apprehended rebellion; and in districts where peace was not so destroyed but that the common law could have its course. And so even in our own time, no later than in the last reign,

on Military Law, as if it referred to *military law;* as though the great commentator were not aware that it had been for the greater part of a century established by statute! This distinction between martial law and military law, when the above explanation is given, is easy and obvious; but without attention to the history of the subject, there is an apparent ambiguity in the earlier works, which is likely to mislead, and as it misled Tytler, so it has misled the Lord Chief Justice, who evidently followed Tytler, a writer rather historical than legal; instead of the works of Hough, MacArthur, and Simmons, which have been in use in the army to the present time as text books, and which mark the distinction in the clearest and strongest manner.

(*a*) In 1796, before any statute authorizing it, martial law was proclaimed by the Lord-Lieutenant of Ireland, the proclamation stating that His

Parliament passed an Act relating to Ireland, in which the prerogative was not only declared, but enacted, and elaborate provisions were laid down for the regulation of its exercise in times of apprehended rebellion, and more especially for the trial of rebels by court-martial, whether civilians or soldiers.

Majesty's general officer had orders to punish, according to martial law, by death or otherwise, all persons acting or in any manner assisting in the rebellion. Under this proclamation great excesses were committed, not only in the district in which the rebellion existed, but in other districts. The rebellion was in Wexford, but Mr. Wright was flogged, without any military authority, in Tipperary; Wolf Tone was tried in Dublin, where there was no martial law, and the courts were sitting; and with reference to the case of Mr. Grogan, who was tried by court-martial in Wexford, in 1798, it is enough to say that if it was after the rebellion was thoroughly quelled, it was therefore illegal; and, though th Lord Chief Justice does not state the facts, it would rather appear that this was the case, and that, therefore, the execution was illegal; and further, it was a case of *treason*, which might, be *constructive* in *conspiring* to rebel; and it is to be observed that the opinion of Mr. Hargreave, cited by the Lord Chief Justice, treats of it as an execution for *treason*, and his opinion against it is evidently grounded on the assumption that the rebellion was over; for he says that "he saw the right to arrest those in rebellion, and to have them imprisoned for trial according to the law of treason; but he could not see that trying rebels, according to martial law, was, when Mr. Grogan was put to death, part of the law of England," and then he refers to the Petition of Right and Lord Hale's comment upon it already alluded to, to the effect that martial law is illegal in time of peace, that is, when rebellion was over; or when it was merely apprehended; for which reason a statute passed to authorise it in such cases. And in Wolfe Tone's case, the question was put upon the same principle, and Mr. Curran, the prisoner's counsel, admitted that if the rebellion were raging, martial law would have been legal. And be it observed that these were both cases of civilians. These, therefore, were cases of illegality; and there were also horrible excesses, which required bills of indemnity. But the Imperial Act, the Irish Rebellion Act (1803), applied, whether or not the courts should be open, and applied to apprehended rebellion, and declared, "That nothing herein shall be construed to take away, or abridge, or diminish the undoubted prerogative of the Crown for the public safety, to resort to the exercise of martial law against open enemies or traitors, or any persons, to suppress treason or rebellion." And the 3 & 4 Wm. III. c. 4, declares and enacts that, nothing shall take away, abridge, or diminish the acknowledged prerogative of Her Majesty, for the public safety, to resort to the exercise of martial law against open enemies and traitors.

So in India (*a*), if not in any of the colonies, regulations, or acts of legislature, were passed, providing for the exercise of this important power. In 1846, an Act of the Legislature of Jamaica, passed for the purpose, received the sanction of the Crown under the government of Lord Russell (*b*), and distinctly authorised the Governor in Council to declare and exercise martial law for the suppression of rebellion, without any definition or limitation of the term, without any restriction of its exercise, and leaving it to be applied and exercised according to the sense in which it was understood by Parliament in the other Acts, and in which it was explained by all text books of military law in the hands of the British army, as the application of absolute military law to the whole population.

Nor was this the doctrine of military writers alone (*c*), nor even of lawyers in this country. It was equally laid down by the greatest constitutional writers, not only in this country, but America: and while the illustrious Hallam declared (*d*) that martial law was the suspension of civil juris-

(*a*) In 1804, by Regulation X., the Government of India declared that it may be expedient, in certain cases, that the Governor-General should declare and establish martial law; and then it made provision for the regulation of its service. This was put in operation, and in 1817 was subjected to the comment and exposition of that sound lawyer, the late Serjeant Spankie, the Advocate-General of Bengal; and it is printed with his exposition in *Hough's Military Law*, ed. 1835. So in *MacArthur on Court Martial*, and *Simmons on Court Martial*—all books of received authority in the British army—martial law is described as absolute military power, applying to the whole of the inhabitants of the district.

(*b*) The 9 Vict. c. 35, which recited that it might be necessary to declare martial law, and then provided that it should not be declared except with the assent of the council. There was thus a restriction upon the power of declaring it, but no regulations for its exercise.

(*c*) "The military law, as exercised by the authority of Parliament and the Mutiny Act, annually passed, together with the Articles of War, is not to be confounded with *that different branch of the Royal prerogative called martial law*, which is only to be exercised in time of rebellion" (*MacArthur on Court Martial*, 1-10). So in *Simmons on Court Martial*, 1-14.

(*d*) "There may, indeed, be times of pressing danger when the conservation of all demands the sacrifice of the legal rights of a few; there may be circumstances that not only justify, but compel the temporary abandon-

diction, just as the Great Duke declared it to be the will of the commander, the great Chancellor Kent declared it as the absolute rule of a military chief.

In this position the subject was left, both by Parliament and the Government, in our colonial and foreign dependencies. There were, for the most part, no definite instructions to colonial Governors or military commanders, beyond those contained in the books on military law. And accordingly, when in 1849, a rebellion broke out in Ceylon, martial law was declared and exercised with some severity over the whole population of the disturbed districts, for a period of ten weeks.

On that occasion, under the government of Lord Russell, it was declared by the Government (*a*), that the Governor

ment of constitutional power. It has been usual for all governments during an actual rebellion to proclaim martial law, or the suspension of civil jurisdiction" (*Hallam's Const. Hist.*, vol. i.). "Martial law is quite a distinct thing (*i.e.*, from ordinary military law). It is founded on paramount necessity, and proclaimed by a military chief" (*Kent's Commentaries*, vol. i., 10th ed., p. 377).

(*a*) On that occasion, the duty of a Colonial Governor in such a situation was thus described by an eminent statesman (Lord Russell), then at the head of the Government. "Be it observed that the news of that insurrection came suddenly upon the Governor. He immediately sent for an officer, to whose discretion and whose experience he might well trust. He acted according to that opinion. He immediately saw the general commanding the forces. He took means by which troops should be at once sent to the points at which the insurrection had broken out. He took other means by which the rebels might be promptly met, and the rebellion promptly suppressed; and, in order to do that more effectually, with the concurrence of the general and the Queen's Advocate, he *proclaimed martial law in that district of the colony which was disturbed.* The effect was immediate and most salutary, because, in a few days the armed resistance had ceased. But I must admit that it is a most serious resolution to come to, the establishment of martial law in any district, or in any part of a colony, on account of those circumstances which are inherent and inseparable from martial law. But the Governor had to consider, that if, on the one hand, martial law cannot be continued without the risk of punishments which may reach not the most guilty, but those who have appeared in arms, and are guilty according to the law of high treason and rebellion; on the other hand, the consequence of refusing to continue martial law or to put it in force may be this, that rebellion may gain a head; that insurrection, which

had done his duty in thus declaring and carrying out martial law. When Lord Cottenham and Lord Campbell were in Parliament, and the Attorney-General was Sir John Jervis, and the Judge Advocate-General was Sir David Dundas, an inquiry took place before a Committee of the House of Commons—an inquiry conducted by the most eminent men in Parliament at that time (*a*), and the Judge Advocate-General, and other persons of authority, were examined, and broadly and distinctly laid down the doctrine of martial law as it had thus been carried out, in terms so strong as to include everything which the military authorities might deem necessary for the entire suppression of rebellion, and the restoration of peace and order; and, indeed, Sir David Dundas boldly declared that *no* act done under such authority would be legal, unless such an act as could not possibly be lawful, as wanton cruelty to non-combatants.

at first is weak and may be easily crushed, may become formidable; that the whole order of the colony may be destroyed; that the allegiance which is due to the Crown may be withheld; that property to an indefinite extent may be spoiled and ruined; but, above all, that humanity, for the sake of which martial law was withheld, that humanity itself may be lost sight of, and many more lives may be lost in the struggle that may ensue than would have been lost if martial law had for a few weeks been continued (Lord Russell, House of Commons, May 29, 1851).

(*a*) The committee took a great deal of evidence, comprising that of the Advocate-General of the colony, Sir J. E. Tennant, Colonial Secretary, and Sir David Dundas, Judge Advocate-General; and they all laid down the above doctrines. "The Governor may declare martial law upon a necessity, of which he is to judge" (Ev. of Selby, the Advocate-General, Q. 1361). "The Governor gave general orders to the officer commanding in chief, to carry out martial law, leaving it to him to take what measures he might think necessary" (Ev. of Sir J. E. Tennant, before the committee on Ceylon, 1850; Q. 3346). To the same effect was the evidence of Sir D. Dundas, the Judge Advocate-General. After stating that martial law was far more extensive and arbitrary even than ordinary military law, and is not bound by written laws and formal rules, he said, "I can conceive of cases in which something might be done *which no necessity could possibly justify*, as the torture of a child" (Report of Committee of Inquiry, 1850, Q. 5448). "Martial law is a 'Lex non Scripta,' it arises on a paramount necessity to be judged of by the Executive. Martial law comprises all persons. All are under it in the country or district in which it is proclaimed, whether

On that occasion, also, debates took place upon the subject in both Houses of Parliament, and in the course of those debates these doctrines were declared and laid down as the authority of the greatest lawyers, and the highest civil and military authorities in the country (*a*). And although the attention of the Government and of Parliament was thus called to the question, no measures were taken by Government or Parliament to lay down any definitions, restrictions, or limitations as to the great power thus asserted and declared, or to provide any regulations for its exercise; indeed, it was declared impossible to limit or define it; but it was left, as before, simply as being,

they be civil or military. There is no regular practice laid down in any work on military law, as to how courts-martial are to be conducted, or power exercised under martial law; but, as a rule, I should say that it should approximate as near as possible to the regular forms and course of justice, and the usage of the service, and that it should be conducted with as much humanity as the occasion may allow, according to the conscience and the good judgment of those entrusted with its execution." It overrides all other law. "It is entirely arbitrary; it is far more extensive even than ordinary military law" (*Vide* Ev. of Sir D. Dundas, Judge Advocate-General, before the Ceylon Committee, 1849-50).

(*a*) The Duke of Wellington said, in the House of Lords, on the 1st April, 1851, in reference to the Ceylon rebellion of 1849, "That martial law was neither more or less than the will of the General who commands the army; in fact, martial law is no law at all." And Earl Grey, on the same occasion, said, "that he was glad to hear what the noble Duke had said with reference to what is the true nature of martial law, for it is exactly in accordance with what I myself wrote to my noble Lord Torrington, at the period of those transactions in Ceylon. I am sure I was not wrong in law, for I had the advice of Lord Cottenham, Lord Campbell, and the Attorney-General (Sir J. Jervis), and explained to my noble friend, that what is called proclaiming martial law, is no law at all, but merely for the sake of public safety, in circumstances of great emergency, *setting aside all law, and acting under the military power.*" Sir J. W. Hogg Chairman of the East India Company, said in the House of Commons, on the 29th of May, 1851, when an hon. member was inclined to carp at the statement of the Judge Advocate-General (Sir D. Dundas), that martial law was a denial of all law: "But the Judge-Advocate was quite correct; it was a denial of all law, and consequently the subject of regulation; when martial law was proclaimed, the commanding officer must use his discretion" (Parl. Deb. 1851, Ceylon).

according to the common consent of all authorities, the establishment of absolute and discretionary military power.

Nor was this all. Ten years later, so recently as 1859 (*a*), the same doctrines were distinctly and broadly laid down by Mr. Headlam, the Judge Advocate-General of the time, in an official letter, which was published, and which no one ventured to challenge, and in which the nature of martial law, as absolute military authority, overruling all ordinary law, whether military or municipal, was clearly and unequivocally maintained, with the entire

(*a*) Letters of the Judge Advocate-General, Nov. 25, 1859, in answer to questions put by the Royal Commissioners for National Defences. "There is a broad distinction between martial law, called into existence by a proclamation of martial law, and the law administered by courts-martial for the ordinary government of the army, which for distinction and accuracy may be called military law. The latter, namely, military law, is applicable only to the army, and to such other persons connected with it as are made amenable to military law by express enactment. This law is partly written and partly unwritten. The written portion of it is comprised in the annual Mutiny Acts and the Articles of War issued under them, the provisions of which, like those of the ordinary law of the land, have been divulged and ascertained by a series of decisions given by competent authorities. The unwritten portion of it is founded on established usage, and is recognised by the legislature under the term 'custom of war.' The former, namely, martial law, which is the subject of the present inquiry, is so arbitrary and uncertain in its nature, that the term 'law' cannot be properly applied to it." "Martial law," according to the Duke of Wellington, "is neither more nor less than the will of the General who commands the army." In fact, martial law means no law at all, therefore, the general who declares martial law, and commands that it should be carried into execution, is bound to lay down the rules, regulations, and limits, according to which his will is to be carried out. The effect of a proclamation of martial law, is a notice to the inhabitants that the executive government has taken upon itself the responsibility of suspending the jurisdiction of all the ordinary tribunals for the protection of life, person, and property, and has *authorized the military authorities to do whatever they think expedient for the public safety*" (Letters of Mr. Headlam, Judge Advocate-General, 25th Nov. 1859, cited in the Appendix to the Report of the Royal Commission on National Defences, p. 90). It will be observed how entirely this distinguished person agrees with the illustrious Hallam, and with Chancellor Kent, the two great constitutional authorities of our age. It may also be observed that the very words in which these eminent authorities embody their view—"no law at all"—are derived from the illustrious Hale, that martial law is strictly

approbation of the Government, of Parliament, and the whole country. And upon this footing the subject was left as before, except in Ireland and India, without any other definition, without any restriction or limitation, and without any regulation for the future exercise of this tremendous power, admitted to be vested in any Colonial Governor.

Accordingly, when on the occasion of the recent rebellion in Jamaica, the Governor under a local Act not defining martial law (*a*), but simply imposing certain conditions or restrictions upon the power of declaring it, which the statute itself implies was already in the Governor, he, under the advice of the Attorney-General, and with the assent of the Council, declared it in a form of proclamation, drawn in accordance with these traditions and doctrines on the subject, and purporting to place the whole district under military rule, and to empower the troops to use the measures of war against those found in rebellion. And he, in conjunction with the Commander-in-Chief, upon that prin-

is, as applied to unwritten and irregular military law, as distinguished from regular or written military law. Throughout his charge the Lord Chief Justice has confounded these two different things.

(*a*) 9 & 10 Vict. c. 35, s. 96, "Whereas the appearance of public danger by invasion or otherwise may sometimes make the imposition of martial law necessary; yet as from experience of the mischief and calamities attending it, it must ever be considered as amongst the greatest of evils, be it enacted that it shall not in future be declared or imposed but by the opinion and advice of a Council of War consisting as aforesaid." And the Governor shall be authorised (with such advice), in the event of disturbance or emergency, to declare any district under martial law (s. 97). The phrase martial law, here used in a statute, which does not define it, must therefore be understood in the sense in which it was understood and received *before* the statute; and the advisers of the Governor so understood it, and interpreted it in that sense. If they were wrong, whose fault is it? Surely the fault of Government and Parliament, whose highest authorities had, for a long course of years, so taught them. But it is conceived they were right, and that martial law means this or nothing. The Lord Chief Justice seems to admit that if there ever was a case for martial law in that sense, this was that case, and that, under the statute, it applied to all in rebellion.

ciple, appointed an officer to command the district, who accordingly assumed the entire and exclusive government of it.

On that occasion, when the Governor, under the Local Act, with the assent of the Council, declared martial law, there were no regulations for its exercise (*a*). No instructions have been issued either to Colonial Governors or to military commanders by the Crown; and, indeed, both Parliament and the Crown had acquiesced in what was laid down in the Ceylon case, that no definite instructions could be issued. At all events none were issued, and on the breaking out of the rebellion the Governor was left to his own discretion; and he, having declared martial law, left its execution to the military commander.

The Governor evinced from the first every desire to control and regulate the execution of martial law, to shorten the period of its operation, to substitute as soon as possible a policy of prevention for one of punishment, to limit the infliction of capital punishment to the most serious cases, such as murder or arson (*b*), to limit the infliction even of corporal punishment as much as possible,

(*a*) Mr. Cardwell, in one of his considerate despatches, candidly admitted that no instructions were issued to Colonial Governors on the subject. "I think it is due to Mr. Eyre that I should accompany my observations by the statement that, in the instructions to Colonial Governors, no reference is made to the possible occurrence of such an emergency as that in which he was placed. How far it may be possible to frame general instructions which might assist the Governor in the case of future disturbances arising in any colony, is a subject which will receive careful consideration at the hands of Her Majesty's Government."

(*b*) Thus, about ten days after the operation of martial law began, he wrote to the Commander-in-chief:—"I am of opinion that all prisoners should as rapidly as possible be tried, and those who are not deserving of death or flogging be released. It is not desirable with our over-crowded jails to sentence prisoners to imprisonment, nor *would I advise* that flogging *should be resorted to more than can be helped.* It is my intention to proclaim a general amnesty in the county of Surry to all *except those who have been participators in the murder,* excepting those who are found in possession of stolen property, and excepting those who are now prisoners awaiting trial, upon their coming in and reporting themselves to the civil or military authori-

and to provide for the best possible evidence in all the cases tried, and to send for trial only serious cases. And, further (*a*), he did not consider it proper to try persons under martial law for offences committed *prior* to martial law.

Upon the breaking out of the rebellion, the Governor took exactly the course which had been declared, by Government and Parliament, in the case of Ceylon, to be the right course, except that he continued martial law only for four weeks instead of ten; and would not have continued it in operation so long, had it not been that his orders and directions as to the disposition of the troops were in opposition to the instructions to Colonial Governors (*b*) disapproved of, and opposed by the Commander-in-Chief of the colony. As the necessity for the continuance of martial law so entirely depends on the sufficiency

ties as submitting themselves to the Queen's authority" (Desp. Oct. 26). And a little afterwards to the Commander-in-chief:—"I would beg to suggest that the Colonel should be requested to furnish all the evidence he can, either written or oral, against *each and all* of the prisoners sent in under his authority; and if no evidence of serious crime was obtainable, they would, as a matter of course, be released. If any of the prisoners sent in were taken in arms or with stolen property in their possession, *the parties who captured them should appear before the Courts to give evidence against them. It is only the captors who can declare the grounds upon which the captures were made*" (Desp. Oct. 30, 1865). No particular instructions, however, were issued by the Commander-in-chief, and the Governor's intentions were not carried out.

(*a*) Thus, the Governor, writing to acknowledge the receipt of a despatch from the General expressing his intention not to bring to trial by court-martial certain prisoners on the grounds that the charges against them are or acts prior to the rebellion, said, "I assume that in coming to this decision, he has satisfied himself in each case that there is no evidence directly connecting the prisoners with the immediate outbreak, and in this view of the case I consider he has *exercised a wise and just discrimination in coming to the determination he has done.*"

(*b*) According to these instructions, as stated in a letter of Lord de Grey, War Office, December 1, referring to a former letter of Nov. 20.—"It is there laid down that, as the supreme authority in each colony is entrusted to the Governor, it is for him to determine the general nature of the operations to be undertaken by Her Majesty's troops, for the suppression of rebellion, and to order such steps as the safety and welfare of the colony may appear to him to require to be taken by the commander of the

although all measures that were necessary for the suppression of rebellion were justifiable, yet that the officers and men engaged were responsible before a civil or criminal tribunal for any acts which to such tribunals might appear in excess of what was necessary, even although these acts were committed, honestly, in the execution of orders, honestly given, by the proper authorities, and under the honest belief of their necessity; and it was even distinctly laid down that for any acts of homicide, under such circumstances, the parties were liable to be indicted for murder in this country, and could legally be convicted.

It appeared to the Author that this was so unreasonably

absolute power exercised by military force, for the suppression of insurrection, and the restoration of order and lawful authority. The officers of the Crown are justified in any exertion of physical force, *extending to the destruction of life and property to any extent*, and in any manner that may be required for the purpose; but they are not justified in the use of excessive or cruel means, and are liable, civilly or criminally, for such excesses. They are not justified in inflicting punishments after resistance is suppressed, and after the ordinary courts of justice can be reopened. Courts-martial, by which martial law, in this sense of the word, is administered, are not, properly speaking, courts-martial, nor courts at all, and are mere committees formed for the purpose of carrying into execution that discretionary power assumed by the Government."—(Opinion of Mr. E. James and Mr. Fitzjames Stephens). The effect of the opinion, it will be observed, was that there was no legal authority in the execution of martial law; that it was a question in each case of necessity; and moreover, that of this necessity the jury were to judge; and a jury in this country, at an immense distance from the scene, and under insuperable difficulties in judging on the subject, with no adequate means, even of obtaining *evidence* upon it, still less of forming a judgment upon it. The effect, therefore, of this opinion was, that if in any one case a jury in this country could be got to think the execution unnecessary, the persons concerned in it would be guilty of murder; although at the moment it *appeared* to be necessary, and although every one in the colony honestly so believed, and although they acted in obedience to orders from military superiors. It came therefore to this, that the law said to officers, "Do all that is in your opinion necessary to put down the rebellion; execute any number of persons you believe necessary for the purpose; but mind, if in a single instance you make a mistake, and direct an execution which an English jury twelve months afterwards may be brought to think unnecessary, you will be deemed guilty of murder."

unjust, not to say absurd (*a*), that it could not possibly be law; he could not reconcile it with justice or common sense, nor with the doctrines of martial law, which had been laid down by the highest legal and constitutional authorities; nor with the current of authority upon the subject, or the language of Parliament itself. And it appeared to him, that the application of such a view of the law, to the case of the officers, would be, for special reasons (*b*), pecu-

(*a*) The attempt to apply the doctrine would have involved the most hopeless and monstrous injustice. Necessity, in such a sense, must of course mean necessity with reference to the general condition of the colony or of the district, and must be determined by the central and supreme authority, upon the general result of facts at all points in it; and it might be that an execution might be unnecessary with reference to the state of circumstances at the particular spot where it took place, which nevertheless would be necessary with reference to the general condition of the district; or, on the other hand, the execution might appear to be necessary at the particular place, but with reference to the general condition of the colony might be unnecessary. And if the test of criminal liability was to be necessity, there would be such an utter uncertainty as to what might be afterwards deemed a case of necessity, that the officers and men would be afraid in any given case to act, and thus would be placed in the most disagreeable dilemma between mutiny and criminal liability. No doubt, orders will not justify an act manifestly illegal, as, to shoot or hang a man in a state of peace, without conflict, or resistance, or trial; but, as the case appeared, the act could not be manifestly illegal, for it is admitted that it might be legal, that is, if it was necessary. But then it might turn out, or after the event it might be thought to have been, unnecessary; and then the hypothesis is, that however honest the act, and however necessary it might have appeared, it would be murder. Surely there never could be a greater or more cruel injustice.

(*b*) The special considerations above alluded to are these:—At common law the men could only be tried in the colony for any act committed there, and there they would be able to get evidence. The Colonial Governors Act, which allowed of trial in this country for misdemeanour, carefully made provision for the obtaining of evidence by means of commission. The Criminal Consolidation Act, which was passed without reference to such exceptional cases, merely enacted that in all cases of alleged murder of subjects here or abroad, the trial may be here; but no provision is made for obtaining of evidence. And further, trial must be either at the assizes or the Central Criminal Court; or removed by *certiorari* into the Court of Queen's Bench; and in the former case there could be no special jury, and in the latter case no review of the law in a court of criminal appeal,

liarly unjust; and that their trial on any such charges would practically amount to a denial of justice, and be a deliberate sacrifice of men who had, it might be with more or less of error and excess, done their best on a great emergency, and at all events had saved a colony.

The Author, therefore, wrote a book in which he endeavoured to show that such was not the law (*a*), and that the doctrine of martial law laid down by such high legal, military, and constitutional authority, was in accordance with the law of England. That is to say, that although the declaration of martial law could only be justified by necessity, and, as it was an act of State, or of Government, must be approved of by the Crown, subject to control of Parliament; yet that when declared

the Act for reservation of Crown Cases not applying to the Queen's Bench. Thus, therefore, when the case came into the Queen's Bench, the opinion of three judges out of five would rule the law without appeal, and the unfortunate men, without any power of obtaining the evidence necessary for their defence, might be convicted of murder, upon a view of the law, contrary to the opinion of almost all the judges of England.

(*a*) The Author ventures to say, that he wrote that work entirely from a sense of justice, and a sincere desire to be of service to the cause of truth and justice; and, on the other hand, without any knowledge of or communication from or with any of the parties engaged in those unhappy transactions; or, on the other hand, without any idea of approval of all the acts committed. Throughout the book he tried to confine himself to the question of legality, and declined to enter into that of moral propriety. The question he discussed was legal liability, and that alone. That is to say, whether, these acts having been done, those who did them could be convicted as murderers; not whether they were rightly done. Unto the question of alleged excesses, in so far as they turned on questions of disputed fact, of course he did not enter; he took the admitted facts, and considered whether upon these statements there was legal culpability. He had no occasion to enter into any question of wanton cruelty, for of course no English lawyer could hesitate to lay it down, as he did again and again, that wanton cruelty *must* be illegal. Whether in fact there had been such cruelties did not belong to his subject to inquire; enough, that the officers denied directing them, and thus admitted their illegality. Dealing with admitted facts, as to a number of executions, the question was as to their bare legality, or rather as to their criminality; and this question, and this alone, the Author discussed, declining very distinctly to enter into their moral propriety, that being a question turning entirely on fact.

by supreme authority, it had legal existence; and that the lawfulness of individual acts in the execution of it, depended on the principle of authority; and that, therefore, all acts done within the declared district, under military orders, were legal, at all events, if done honestly; and that, in particular, as regarded trials by court-martial, it was enough if they were governed, not by the formal rules of common law trials, but by the substantial principles of natural justice.

The Author wrote his book in the interval between the conclusion of the inquiry by the Royal Commissioners and the publication of their Report; and, therefore, his was a concurrent and independent inquiry into the subject. And when their Report appeared, a few days before the publication of his book, he was gratified to find that it contained nothing at variance with the view of the case which he had thus ventured to put forth, and very much, directly or indirectly, appeared to confirm it. Indeed, the very appointment of the Commission, and the whole tenor of the Report, appeared to imply that for acts done in carrying out orders honestly given under martial law, there could be no legal liability (*a*).

(*a*) Thus, with respect to the primary question, as to the proclamation of martial law, the Commissioners said, the council of war had good reason for the advice which they gave, and that the Governor was well justified in acting upon that advice, though they disapproved of the continuance of martial law in its full force to the extreme limit of its statutory operation, and to the excessive nature of the punishment inflicted. And with reference especially to the trials by courts-martial, the Commissioners said:—"The number of executions by order of courts-martial appeared to us so large that it became very important to ascertain, as far as we were able, the principles upon which the members constituting the courts acted, and the sort of evidence upon which their decisions were pronounced. It would be unreasonable to expect that in the circumstances under which these courts were assembled, there should be the same perfect regularity and adherence to technical rules which we are accustomed to witness in our ordinary tribunals; but there are certain great principles which ought under no circumstances to be violated, and there is an amount of evidence which every tribunal should require before it pronounces a judgment which shall affect the life, liberty, or person of any human being. In the great majority of

And not only so, but the practical conclusion at which he had arrived was confirmed by two successive Governments, under the advice of their law officers (*a*). These Governments distinctly declared, publicly, and in the face of Parliament and the country, that all acts done in the declared district by military orders, under martial law, were legal, and did not require a bill of indemnity. And this conclusion was ratified by the almost unanimous assent of both Houses of Parliament, the Ministers of the Crown, in one House declaring the acts legal, and in the other House describing the prosecution as preposterous.

cases the evidence seems to have been unobjectionable in character, and quite sufficient to justify the finding of the court. It is right also to state that the account given by the more trustworthy witnesses as to the manner and deportment of the members of the courts was decidedly favourable. But we think it right also to call attention to cases in which either the finding or the sentence was not justified by any evidence appearing on the face of the proceedings. And then they pointed out that in a few cases the evidence appeared *to them* insufficient to justify the findings, a conclusion which, as every lawyer knows, implies no doubt as to their legality; for at every assizes juries find prisoners guilty of felony against the distinct opinion and direction of the judge that the evidence is insufficient; and yet, even in such cases, the judge is bound to, and does pass sentence, for the very reason that as *they* are judges of the facts, the convictions are legal.

(*a*) Mr. Cardwell, the Secretary for the Colonies, in his despatch, declaring the deliberate opinions of his Government upon the whole case, adopted the conclusions of the Commissioners, and as the result, he wrote as follows:—"Her Majesty's Government are advised by the law officers of the Crown that the effect of the Indemnity Act will not be to cover acts done either by the Governor or by subordinate officers, unless they are such as (in the case of the Governor) he may have reasonably and in good faith considered to be proper for the purpose of putting an end to the insurrection, or such as (in the case of subordinates) have been done under and in conformity with the orders of superior authority, or (if done *without* such orders) have been done in *good faith* and under a belief, reasonably entertained, that they were proper for the suppression of the insurrection, and for the preservation of the public peace in the land. As regards all acts *done by or under military authority, her Majesty's Government are advised that the proclamation of martial law* under the Island Statute of 1844 operated within the proclaimed district to give as complete an indemnity as the Indemnity Act itself. But for any acts done beyond the proclaimed district the authority of the Act of 1844 and of the proclamation is inapplicable. Civilians

The country, therefore, were not surprised when, after a bench of magistrates had declined to commit the Governor upon a charge of murder, even in a case in which he was alleged to have been personally implicated, by sanctioning the execution, the Lord Chief Justice of England, upon an indictment against the military officer in the same case, at the close of an elaborate charge, in which he avowed himself in doubt upon the subject, in effect directed the grand jury, in accordance with the authorities (*a*), that if they thought the accused had acted honestly, and under an

who may have acted *bonâ fide* for the suppression of the rebellion, although without military authority, would have a protection secured to them by the Indemnity Act which they might not obtain from the mere operation of martial law." The law officers of the Crown at that time were Sir Roundell Palmer and Sir R. R. Collier. The succeeding Government were advised by Sir H. Cairns, Sir J. Rolt, and Sir W. Bovill; and they being questioned in the House of Commons, declared, after due deliberation, that all the acts done under military orders, or by courts-martial, were legal. And the Secretary of State for the Colonies, in the House of Lords, declared that a criminal prosecution under such circumstances would be preposterous.

(*a*) It is certain, said Lord Chief Justice De Grey, that no man ought to suffer criminally for an error in judgment (*Miller* v, *Searcs*, 2 Sir William Blackstone's reports, 1144). So the case of *Wall* v. *Macnamara*, cited, 1 Term. rep. 536, an action against the Lieutenant-Governor of Senegambia for imprisoning him for disobedience of orders, Lord Mansfield said:—"In trying the legality of acts done by military officers in the exercise of their duty, particularly beyond seas, where cases may occur *without the possibility of application for proper advice*, great latitude ought to be allowed, and they ought not to suffer for a slip of form, if their intention appears to have been upright. The principal inquiry to be made by a court of justice is, *how the heart stood*. And if there appears to be nothing wrong there—great latitude will be allowed for misapprehension or mistake." This seems the meaning of Lord Chief Baron Macdonald in Governor Wall's case:—"When a well-intentioned officer is at a great distance from his native country, and it shall not appear that circumstances arise which may *disturb and alarm the strongest mind*, it were not proper that strictness and rigour should be required, where you find a real, true, and genuine intention of acting for the best for the sake of the public. He is not in *a position for getting assistance and advice*; and if in those circumstances he should be somewhat thrown off the balance of his understanding, and does not exceed *greatly* the line of his duty, allowance for such circumstances ought to be given him."

honest and reasonable belief of authority, they should dismiss the case. This is stated to be the effect of his direction, for, although in some passages of his charge he appeared to leave to them the question of the legality of *martial law* (*a*), yet that would be entirely a question of pure law; and it would be so contrary to principle and precedent to leave to the jury matter of law, that it is to be presumed he intended, coupling it, as he did, with the candid avowal that his mind was left in doubt, to indicate to them that they ought to give the accused the benefit of that doubt, and determine the case, substantially, on the issue of honesty.

The legal and military professions were prepared to receive, with deference, any exposition of the law which might be laid down by so exalted an authority as the Lord Chief Justice of England. And the length of time which has elapsed since the unhappy events occurred which came in question, and the ample elucidation the law had received (*b*), in publications and forensic discussions, and the

(*a*) The Lord Chief Justice appears to have told the jury there were two questions: one as to the legality of martial law as applied to civilians, the other as to the honesty of its application in the particular case, and in terms left the question thus: Was it legal? and if so, was it honest? It is conceived that the first would be a question of pure law, not for the jury; and that the other question should have been, not if it was legal, was it honest, but if it was not legal, was it honest; and under a sufficient colour and belief of legal authority to take away that character of felonious and malicious homicide, which is essential to constitute the crime of murder. And as to leave pure law to the jury would be unprecedented, and the Lord Chief Justice avowed he was in doubt; surely he must have intended to leave to them substantially the question of honest belief in, and colour of, authority.

(*b*) The Author's book had been published many months; the matter had been argued with exhaustive ability on the other view of the subject, by his learned friend Mr. FitzJames Stephen, whose able arguments concerning all the authorities had been published; and other gentlemen of ability had written largely on the subject, so that all the materials for judicial decision had been for months before the mind of the Lord Chief Justice; during the whole of which time he must have known that, in all probability, the matter must come before him, and he had all that time ample opportunity for discussion with his learned brethren; so that there

opportunity thus afforded for research and for reflection, naturally induced the expectation of some clear and decided declaration of the law upon the subject. The professions, however, were doomed to be disappointed; for, though the charge dealt so largely in denunciation of doctrines laid down, or supposed to be laid down, that it was popularly taken as decisive, it really was utterly indeterminate and indecisive; it laid nothing down clearly and positively on the subject: it appeared even to leave the matter of law to the jury; it avowed a state of entire doubt; and, indeed, assigned this as a reason why bills for murder should be found, in order to put the matter in a train for solemn determination (*a*).

The Lord Chief Justice laid down, indeed, one proposition of law (*b*), at which the Author was startled, and which

never was an occasion when the world were more entitled to expect a clear and decisive declaration of the law. Yet, though there was much denunciation of law laid down by others, there was no positive declaration of law laid down by the Lord Chief Justice. And it must be observed that the mere denunciation of propositions laid down by others, involves really no declaration of the law at all; it merely goes to the terms and expressions of particular propositions. It leaves what the law really is, just where it was before. It simply amounts to this, that a particular writer is more or less inaccurate, a matter of entire unimportance.

(*a*) This, it is conceived, for reasons already mentioned, was an entire error. The law could not have been laid down definitively and decisively, nor with the least satisfaction to the public.

(*b*) The Lord Chief Justice says, that "we must bear in mind that we are not dealing with cases in which it is admitted that man cannot be put to death or punished, without some form of trial. We are not dealing with the case of rebels killed on the field of battle, or put to death afterwards, without any trial at all. A rebel in arms stands in the position of a public enemy; and you may kill him in battle, or refuse him quarter, as you may a foreign enemy (Charge, p. 25)." The Author was not aware that it was according to the usages of war to refuse quarter to an honourable enemy; but be that as it may, he ventures to declare that, beyond all doubt it would be contrary to common law to slay a rebel who surrendered himself prisoner. All authorities of our common law lay it down that, if a rebel or traitor can be taken, he must be taken, and is entitled to legal trial. It is only when a felon cannot be taken, or resists apprehension, or is in actual conflict, that he can be lawfully killed. And even under martial law the

he ventures to declare is not law. In this and other passages, the Lord Chief Justice seems to have been willing to admit everything but the *name* of martial law, and to allow of it under the name of common law. It is very necessary, however, to distinguish what may and may not be done at common law, or worse evils may follow than any which could result from the declaration of martial law, under responsible authority, and a paramount necessity. The Lord Chief Justice seems to have lost sight of these distinctions, and in his anxiety to avoid the name of martial law, to be ready to sanction things, in the name of common law, which both martial law and common law alike would condemn. Over and over again the Lord Chief Justice, in *effect, concedes all that martial law involves, and* something more; and though he will not admit it in name and in terms, yet, on the other hand, he nowhere ventures distinctly to deny it.

For it is most remarkable, that after such long time for consideration, and with such ample materials for judgment, the Lord Chief Justice, with views evidently most adverse to martial law, could not venture, anywhere throughout his elaborate charge, distinctly, and in clear terms, to declare it to be illegal. That is to say, he nowhere lays it down, in clear and distinct terms, nor indeed in any terms, that for the suppression of a rebellion of civilians, martial law may not be applied to civilians. He might well hesitate to lay that down, as it would come to this, that it may not be applied for the suppression of rebellion; for, of course, in a rebellion of civilians, as there are no rebels but civilians, if martial law cannot be applicable to them, it is not

Author ventures to say that it would be contrary to those usages of war which should regulate it, to slay prisoners in cold blood, except under the pressure of some imminent present necessity, without some trial; for it is well known that, in cases of rebellion, many are less guilty than others—they have been compelled to join; or have done no actual mischief; and humanity and policy alike dictate some degree of discrimination, even in the terrible severities of martial law. And this requires *inquiry*.

available at all. Nay, it may be added, that not only does the Lord Chief Justice nowhere venture to deny this, but he virtually admits it; for he admits that when a statute simply enacts, that martial law may be declared, without more, it does mean the application of martial law to civilians (although he thinks it is *regular* military law, which, as will be shown, is impossible), and as, when a statute uses a phrase already used and known, without defining it, or altering its meaning, it can only be interpreted in the sense in which it was previously used and understood. This admission by the Lord Chief Justice virtually amounts to an admission that martial law *had* been so understood (*a*), as clearly, and beyond all doubt, it had, according to the numerous authorities already cited.

The language of the Lord Chief Justice, in some passages of his charge, appears to imply that an arbitrary power is supposed of suspending at pleasure the constitution of a country or a colony. No one has ever, that the Author is aware, imagined such a power. All the authorities upon the subject suppose, and he has throughout assumed, that the constitution, or the ordinary course of law, is *de facto* suspended by the rebellion, or the state of war. If it is not so, then martial law would not be lawful; if it is so suspended, then it is practically useless to discuss whether it is lawful, for it is dictated by a paramount necessity, rising above all law. But, in the view of the Author, the authorities establish that in *such* case martial law is recognized by the common law itself, and the Lord Chief Justice nowhere ventures distinctly to declare that it

(*a*) It had perhaps occurred to the mind of the Lord Chief Justice that this was an admission which virtually concludes the controversy, and accordingly in his printed charge he tries to avoid it, by suggesting a doubt whether his original idea was correct, that "martial law" in the statute meant martial law in this sense; and he eagerly adopts a suggestion that it meant putting the militia under martial law! But they are already under it, when called out and employed; and moreover, it is a queer way of putting down a rebellion to declare martial law, not against the rebels, but against the loyal soldiers of the Crown.

is not. But as it is admitted on all hands that there is and must be a power to do all that is necessary for the safety and protection of a country or colony, and it follows therefore that, if the course of ordinary law is *de facto* suspended, so that it cannot have its course, the measures of war must be resorted to as against all who are in opposition to it; and this, in effect, is martial law (*a*).

The Lord Chief Justice does indeed lay it down broadly and clearly (*b*), that there can be no exercise of martial law

(*a*) The Author was careful in his book to lay down, that it is not from the declaration of martial law, but from the rise of the rebellion, a rebellion so formidable as to stop the course of law, that the operation of martial law began; that it operated only as declaring a state of things already existing, the suspension of ordinary law. And when it is said, as it is by the highest authorities, martial law is the suspension of ordinary law, what is meant is, that it implies the fact of such suspension.

(*b*) "If it be true that you can apply martial law for the purpose of suppressing rebellion, it is *equally certain* that you cannot bring men to trial for treason under martial law *after a rebellion has been suppressed.* It is well established, according to the admission of everybody, even of those who go the farthest in upholding martial law, that the only justification of it is founded on the assumption of an absolute necessity, *a necessity paramount to all law*; and which, lest the commonwealth should perish, authorises this arbitrary and despotic proceeding; but it never has been said that martial law could be resorted to *when all the acts of rebellion had passed away,* and order and tranquillity had been restored, for the mere purpose of trying and punishing persons when there was no longer any sufficient cause for withdrawing from the ordinary tribunals and ordinary law" (Charge, p. 29). No doubt; but here it will be observed that the Lord Chief Justice plainly implies (1) that there may be a paramount necessity which will justify martial law; (2) that where there is such a necessity, it is paramount to all law—it is arbitrary and despotic—which is all that was ever contended. Elsewhere, the Lord Chief Justice says, "Would the Crown in case of rebellion have power to govern the army independently of the Mutiny Act? For instance, to declare offences capital which are not made so by the Act? Would the *Crown have power to place the subject under martial law?* These are *grave questions.* Their solution is only to be found in a *recurrence to first principles*" (Charge, p. 69). The Lord Chief Justice does not go further. He had, indeed, already solved these questions, by reference to the "first principles" of necessity. The Author has endeavoured in the ensuing pages simply to carry out that solution of the question by a recurrence to first principles and judicial decisions.

after a rebellion is over, or merely for the purpose of trial and punishment of the rebels, but that was, as he himself says, never doubted, and there is a marked contrast between the clear and positive terms in which he lays down that, and the entire absence of any such distinct denial of the lawfulness of martial law for the suppression of rebellion; added to which the terms in which he speaks of the latter, almost imply an admission, to say the least, not only of the possibility of its legality, but of its positive legality, when under an existing necessity, paramount to all law.

And it is, the Author thinks, deeply to be regretted that the Lord Chief Justice, though he nowhere ventures to declare martial law for the suppression of rebellion to be illegal, yet it should have produced the impression that it was so; although, after such ample opportunities for consideration and research, he has not discovered a single atom of authority in support of the proposition, which he does not, therefore, anywhere venture to lay down, that martial law, for the suppression of rebellion, is not lawful. Instead of that, the Lord Chief Justice has travelled into a variety of irrelevant topics, and accumulated instances in which martial law was resorted to, *not* for the suppression of rebellion; cases where there was no rebellion, and where rebellion was over, and in which, therefore, of course, it was illegal. But he cites no authority against martial law for the suppression of rebellion. And he nowhere meets and faces the case of a rebellion, such as defies all or any means of suppression; and he nowhere lays it down, either in clear and explicit terms, that in such a case martial law is *not* lawful, or that it *is*. He has simply denounced a writer who maintained that it *was* so. If the Lord Chief Justice had laid down clearly that it was not so, and had contented himself with so doing, the Author—although his own view of the law would have remained the same—would have deferred to such authority. But as the Lord Chief Justice, while, on the one hand not venturing to lay that down, nor, indeed, to commit himself to any definite

proposition at all, has denounced the Author in no measured terms; and has almost challenged him, from the judgment seat, to come forward and vindicate his views; he does not feel that there would be any presumption in his attempting to do so; and, indeed, it would almost appear that he owes it to the Lord Chief Justice and to himself to do so.

The Lord Chief Justice seems to have supposed, and, indeed, suggested to the jury that they should find a bill for murder on the ground that the legality of martial law might be tested and determined (*a*). But this view

(*a*) The Lord Chief Justice, in the course of his charge, said, "Therefore, if *you* should be of opinion that this is a case in which the want of jurisdiction is either established, or is so far left a matter of question as that you think those who have exercised it ought to justify what they have done before a jury of their countrymen in an English court of justice, where every question will be carefully sifted, and the law carefully ascertained and determined upon the most mature judicial deliberation, then, I say, however sorry we may be that gentlemen who have intended to do their duty, and who believed themselves to have been acting under a valid authority, should be made amenable at the bar of a criminal court for the crime of murder; yet, if they have taken upon themselves to put a fellow-subject to death without lawful authority, they must be content to stand by the consequences of what they have done. If, in the exercise of an assumed power they have, in putting this man to death, done that which the law will not justify them in doing, they must be amenable to the laws of their country." The Author ventures to protest against this doctrine, as utterly irreconcileable with legal principle or with the weight of authority. Murder is not mere illegal killing, or the indictment would aver that A. wilfully and unlawfully killed B.; whereas that, as every lawyer knows, would be bad even after verdict. Murder is the killing another, "feloniously, wilfully, and with malice aforethought;" and though malice does not certainly mean merely personal ill-will, it clearly means some bad motive or feeling; and feloniously means at the least wickedly, which indeed, in old indictments, is alleged by way of explanation or interpretation of the other epithet. Now in almost all cases where one kills another unlawfully and wilfully, it is done wickedly and with bad motive; and therefore the impression naturally might arise that wilful and illegal killing must be murder as a matter of law, where in nine cases out of ten it would be in fact. And the Author avows that he at first entertained this idea, and that one or two passages in his book countenanced it. But a closer consideration of the subject and examination of the authorities, has satisfied him that it is fallacious. The older text writers put numerous

involved the assumption that, on an indictment for murder, the simple question would be legality or illegality. But this, the Author ventures to think, was a great fallacy, and he does not think that, upon consideration, it will be found that a wilful and illegal homicide is necessarily murder. He ventures rather to think the law is, that a homicide *wilfully illegal*, that is, knowingly or culpably illegal, is murder, not that the mere illegality of the act makes it murder; the question, he conceives, would be whether, if there was such a colour of authority, *i.e.*, such

instances of illegal killing first as cases of murder, but they are all cases of *wilful illegality*; *i. e.*, cases in which their legality *was known*. So it is of the case put by Coke as to martial law; as, that it is murder to hang a man by martial law in *time of peace*. For a man must know that this is illegal; it is clearly so. Otherwise, if there were rebellion, and the man acted under orders, and it was not time of peace, even although the judges on strict consideration should hold that it was not *time of war*, so as to justify martial law. That case is never put as one of murder. Nor the case of a judge of assize sitting by some mistake without a commission. The maxim *ignorantia legis non excusat* does not apply where the question is as to felonious malice, not of justification or excuse. There can be no felonious malice where there is an apparent legal authority. Thus, in *Foster's Crown Law*, after saying there must be malice either express or implied, he says, "I believe most, if not all, the cases in which our books are ranged under the head of implied malice, will, if carefully adverted to, be found to turn upon this single point, that the fact hath been attended with such circumstances as carry with them the plain indication of a heart regardless of social duty, and fatally bent upon mischief (p. 257). Speaking of the responsibility of the judge who pronounces, and of the officer who executes a sentence, a great writer says:—"If the person who pronounced the sentence had no colour of authority at all, it is undoubtedly murder in him and in the person who *knowingly* executed such a sentence. But if there be but slight colour, and the judge acted *bonâ fide*, and under a belief, though mistaken, that he had competent jurisdiction, he could not, I think, be guilty of murder (*East's Pleas of the Crown*, 95). It is true that it is laid down in *Russell on Crimes*, that if any one person wilfully and illegally puts another person to death, that act is, *primâ facie*, murder, unless it can be reduced either to manslaughter or excusable homicide, the proof of which lies upon the party who caused the death. But to reconcile this with the older authorities and with legal principles it is necessary, and only necessary, so to read it, as to apply the wilfulness, not merely to the act, but to the illegality.

appearance of it, a man reasonably might believe he had authority, and whether he acted honestly in the belief of such authority. Otherwise, it is obvious the law would be in opposition to moral feeling, and sound sense and reason, and he has more than once heard a great judge lay it down that, in matters of criminal law, if a certain view is unreasonable, it can hardly be law. Upon this view, as the parties had acted under the authority of an Act of Parliament, and under orders from the highest civil and military authorities, it follows that they could not, independently of any bill of indemnity, be criminally liable, unless they acted with bad motives; and, therefore, the prosecution could not possibly, whatever the verdict, have determined anything as to the legality of martial law.

These considerations are strong to show that the question of legality can practically never be settled by judicial determination, seeing that, if men in authority have acted honestly in a great public emergency, no jury will be likely to find against them in any proceeding, civil or criminal, added to which, there is certain to be (as there is in the Jamaica case), a bill of indemnity.

There is, indeed, one expression of opinion on the part of the Lord Chief Justice, in which the Author ventures to say he thinks most persons will entirely concur (*a*), viz.,

(*a*) "There are those who, though satisfied of the illegality of martial law, hold nevertheless that a Governor or other officer invested with executive authority from the Crown, is bound in case of necessity to put martial law in force, and *trust to Parliament* for a statutory indemnity. To my mind, the exercise of martial law cannot be put upon a worse footing. No man ought to be placed in the position of being called upon knowingly to violate the law. The only legitimate purpose of an Indemnity Act is to protect a man when placed in trying circumstances, and called upon to exercise a doubtful and ill-defined power, has gone, as is very likely to happen in such a case, in ignorance or haste, but not intentionally, beyond the limits of the law. If the legality of martial law be doubtful, and it is deemed desirable that there should be power to resort to it in great emergencies, let that power be recognised or established by Parliament. But in that case, let us hope that the exercise of martial law will be placed under due limitation, and its administration fenced round by the safe-

that the Governors of colonies or dependencies ought not to be left to act upon their own responsibility, trusting to bills of indemnity; but that the power of declaring martial law, for the suppression of rebellion, ought, if doubted, to be declared and defined, and its exercise regulated and restrained, if necessary, by Acts of Parliament, or of the Colonial Legislatures; or by instructions from the Crown.

And although on a recent occasion, with reference to cases of local Acts, which, without any limitation or restraint upon the exercise of martial law, might appear to encourage Governors in declaring it without adequate necessity, the Colonial Secretary issued despatches (*a*), in which he condemned such local acts;

guards which were wisely provided by the Irish Act of 1833 (Charge, p. 75). And elsewhere the Lord Chief Justice says, "In case of need, a wise Government would probably have recourse to Parliamentary authority for the purpose; the more so, as then such restrictions and conditions can be placed on the exercise of this anomalous jurisdiction as may arise in the observance of those things which are essential to justice" (Charge, p. 531). The Author may be permitted to observe that the above ideas as to the true scope of a bill of indemnity are precisely those which he ventured to express in the preface to his work.

(*a*) The following circular despatch by Lord Carnarvon to Colonial Governors, dated Jan. 30, 1867, on the subject of martial law, has been presented to both Houses of Parliament by command of Her Majesty:—"Sir,—Although I do not know that there exists in the colony under your government any law authorising the proclamation of martial law by the Governor, I think it advisable to communicate to you, for your information, and if necessary for your guidance, an extract of a despatch addressed by me to the Governor of Antigua, in which I have stated the views of Her Majesty's Government on this subject: 'An enactment which purports to invest the Executive Government with a permanent power of suspending the ordinary law of the colony, of removing the known safeguards of life and property, and of *legalising in advance* such measures as may be deemed conducive to the establishment of order, by the military officer charged with the suppression of disturbances, is, I need hardly say, entirely at variance with the spirit of English law. If its existence can in any case be justified, it can only be because there exists such a state of established insecurity as renders it necessary for the safety and confidence of the well-disposed that, in times of national emergency, the Government

and which contained some expressions apparently giving a countenance to the view thus repudiated by the Lord Chief Justice; it is probable that, upon reflection, those expressions would be corrected by his sounder opinion; and perhaps no more was intended than that the Governor should act upon his responsibility, and that if a bill of indemnity should be necessary, as it might, even assuming the legality of martial law, for any unintentional error, there should not be a wholesale indemnity beforehand. On that construction the views of the Colonial Secretary and the Lord Chief Justice would substantially concur.

So far as it is possible to extract any definite propositions on the subject from the charge, the propositions it presents are these: That martial law means merely the common law right of resistance to actual insurrection—*i. e.* nothing; or the application to civilians of regular military law, which is impossible, seeing that this military law exists only by statutes, which are expressly limited to soldiers of the crown. In either

should possess this extraordinary facility for the suppression of armed rebellion. But whatever apprehensions or disturbances which may exist in any of Her Majesty's colonies, it is certain that no such chronic insecurity prevails in any of them, and in no colony, therefore, should the power given by the present law to the Governor of Antigua be suffered to continue. I think it, therefore, necessary to repeat the instructions given by my predecessor, and to request that you will cause to be submitted to the legislature an Act repealing so much of the law as authorises the proclamation of martial law. I have only to add, that in giving these instructions, Her Majesty's Government must not be supposed to convey an absolute prohibition of all recourse to martial law under the stress of great measures, and in anticipation of an Act of Indemnity. The justification, however, of such a step, must rest on the pressure of the moment, and the Governor cannot by any instructions be relieved from the obligation of deciding for himself, under that pressure, whether the responsibility of proclaiming martial law is or is not greater than that of refraining from doing so.' The last passage appears to contain the pith and true meaning of the despatch. The Act of Indemnity alluded to may be merely an Act such as is almost always required for casual unintentional illegalities, such as the Lord Chief Justice alludes to.

view the declaration of martial law becomes an absurdity, for it is a declaration of things which already exist, and one which cannot possibly be applicable (*a*). And in either view the recommendation of the grand jury, that martial law should be more clearly defined, would become nugatory and unmeaning, for in such view there is no such thing as martial law. To be anything, it must be *absolute*.

For this very reason, more than half a century ago, the East India Company had wisely framed regulations, defining, regulating, and restraining the exercise of the undoubted but terrible power of martial law (*b*); more than thirty years ago, as already mentioned, Parliament *did* this for Ireland. More than a quarter of a century ago, the suggestion was thrown out, in a military work of high authority, that the exercise of martial law in time of rebellion, in our foreign dependencies, should be regulated and restrained; but it was not done, and military commanders were left to act on their own discretion; and then the Governor and officers, who, left without regulations or directions, did their best to save a colony in a terrible emergency, were to be arraigned as murderers, because it was said that they had not exercised due control (*c*). It was, therefore, most wise and just that the grand jury, if they believed there was such a power as martial law, should desire that it be more clearly defined.

(*a*) It has been always held, that regular military law only applies to the soldiers of the Crown (*vide Bradley* v. *Arthur*, 4 B. & C. 292), and it would indeed be a new doctrine that the terms of statutes, expressly limited to a particular class of persons, could by proclamation be applied to others. This is a legal impossibility; nothing but a statute can extend a statute, and there must be a positive explicit enactment that the former statute shall apply to other classes of persons. Proclamation of martial law in time of rebellion, whether by statute or otherwise, may have some effect or no effect, but it cannot possibly have *that* effect. If it has any effect, it must be that which all writers describe it to have, viz., the establishment of something wholly abnormal and arbitrary.

(*b*) *Vide ante*, p. 6; *et vide Hough's Military Law*, in which will be found the Regulation on the subject already alluded to.

(*c*) The very fact that Parliament considered it necessary in this Act to

The Lord Chief Justice declared his concurrence in that recommendation, and does not appear to recognize in it any inconsistency with his own views. But if the view which the Lord Chief Justice appears to adopt is correct, that martial law (*a*) is the application of regular military law, then of course it does not require to be more clearly defined, for it is already as strictly defined as it possibly can be. But if it be, as all authorities declare it to be, absolute military authority, then, indeed, there is great need for definition and regulation, and in all that the Lord Chief Justice says on that head, no one more heartily concurs than the Author; and he would willingly contribute any assistance, in the way of suggestion, to carry out the recommendation.

provide regulations for courts-martial in time of rebellion, appears plainly to imply the belief of Parliament, that under martial law there might be such courts-martial on civilians, and also that unless statutes so provided, these courts-martial would not be subject to strict regular military law; or otherwise these regulations would have been unnecessary. It may be observed here, that the Lord Chief Justice is under an error in supposing that in the Ceylon case the courts-martial were regularly constituted under the Articles of War; on the contrary, the chief ground of complaint was that they were not, and it was on that occasion the Duke of Wellington said martial law was arbitrary. In order to repel that objection, the Lord Chief Justice tries to distinguish Ceylon as a Crown colony, though elsewhere he appears to be under the impression that British subjects carry the common law with them; and if so, the distinction of a Crown colony, which only has regard to the form of government, can make no difference. If, however, all the high authorities referred to are right, martial law is recognised even by the common law of England, so that this distinction, even if it exists, is not now at all material. The same observation applies to the elaborate argument of the Lord Chief Justice, directed to show that the common law previously in Jamaica, and it is still more irrelevant, because there is a statute in that colony expressly authorising martial law.

(*a*) The Lord Chief Justice had not observed the legal impossibility of extending regular military law, which by statute applies only to soldiers, for which reason all authorities carefully distinguish regular military law from "martial law" (*vide* MacArthur, Simmons, and Chancellor Kent, cited *ante*). But a *little reflection would have* shown him that the application of this regular military law, in time of rebellion, is practically as impossible as it is legally so; for in distant colonies and

But, then, this necessarily involves and implies that there *is* such a thing as martial law, as distinct from common law, and from all ordinary law, municipal, or military. For ordinary law is regular and well-defined already, and needs no clearer definition; and if such a thing as martial law does not exist distinct therefrom, it cannot be defined. But if, as the highest authorities, legal, military, and constitutional, have always laid it down, it is the suspension of civil jurisdiction (*a*), as declared by the Royal Commission,

dependencies, where the necessity for martial law is most likely to arise, it would be impossible to carry out the requisitions of regular military law, on account of the deficiency of officers of the proper rank to form courts-martial according to the rules. This, however, is no reason why this regular military law should not, as far as it is applicable, be made the basis of regulations on the subject; and it is remarkable that a quarter of a century ago this suggestion was thrown out in a military work (*Hough's Military Law*); in which it is suggested that courts-martial, in time of rebellion, should be constituted as under the Irish Rebellion Act. "There may be various acts, such as circulating papers, exciting disaffection, &c., which should be defined, and the punishment laid down. They *might* be tried by military courts, but general courts-martial, say with seven or five officers, or even three, if more could not be assembled without inconvenience. It may be inconvenient to hand them over to the civil power; the courts 'may be framed as under the Irish Suppression Act of 1833" (*Hough's Military Law*, 350).

(*a*) It is remarkable that the Royal Commissioners in the Jamaica case, incidentally and indirectly, but not the less distinctly, defined martial law, and defined it in the words of the great constitutional historian, Hallam, as "the suspension of civil jurisdiction," and as virtually arbitrary; for, after describing the evils which prevailed during the existence of martial law, they said, "We fear that this to a certain extent must ever be the case when the ordinary laws, framed for the suppression of wrongdoing and the protection of the well-doer, are for a time suspended. The circumstances which are supposed to render necessary their suspension are almost sure to be such as to excite both fear and passion, and some injustice." And they went on to declare, "that by the continuance of martial law in its full force, to the extreme limit of its statutory operation, the people were deprived for a longer period than necessary, of the great constitutional privileges by which the security of life and liberty is provided;" which plainly implies that it had that effect. And be it observed, that the Jamaica Act did not define martial law, but simply allowed and declared it, so that whatever it was at common law, it was under the statute. The Commissioners, therefore, evidently took the view the Author had ventured

and by two successive Governments, then, indeed, it may be well that it should, as far as possible, be defined, regulated, and restrained.

Nevertheless, the Lord Chief Justice, probably not having observed that the proposition had already been virtually adopted by the Royal Commissioners, and by the Government which appointed them, pronounced the strongest reprobation upon the Author's fundamental proposition as to martial law, which was simply an expansion of the doctrine laid down by all the greatest constitutional authorities who had ever written or spoken on the subject: —"Martial law is the suspension of all law but the will of the military commanders entrusted with its execution, to be exercised according to their judgment, and the usages of the service, with no fixed or settled rules, and not bound by the rules of ordinary military law" (*a*). The Lord Chief

to put forth, that it is the suspension of all ordinary law. And this view was virtually adopted by the Government, for the Secretary of State wrote thus upon the above passage: "They agree entirely in the words which you have used, that much which is now lamented might have been avoided if clear and precise instructions had been given for the regulation of the conduct of those engaged in the suppression, and every officer had been made to understand that he would be held responsible for the slightest departure from those instructions. It does not seem reasonable to send officers upon a very difficult and perfectly novel service without instructions, and to leave everything to their judgment." All this plainly implies that everything was left to their judgment.

(*a*) The Author had simply embodied in his text the doctrines laid down by the Judge-Advocate-General, Sir David Dundas (*vide ante*), and which he quoted, with others, in a note. The Lord Chief Justice, in his charge, cites the whole as the Author's, and the Author's alone; and not only does not mention that he had cited, and simply embodied, such authorities, but clearly by his language implies the contrary: that these doctrines were quite novel, and the coinage of the Author's brain. The works of Hallam and of Chancellor Kent were published many years ago, and the former defines martial law as the suspension of civil jurisdiction, and the other as absolute law, "proclaimed by a military chief," carefully contrasting it with ordinary military law. The Lord Chief Justice, no doubt through some mistake of a copyist, left out the word "ordinary" in the above proposition of the Author's, which of course entirely alters the sense: as it stood and as it stands above, it is, he conceives, undoubted

Justice declared, that he "could find no authority for any such doctrines," and pronounced them to be "detestable, mischievous, and despotic." Yet, in this same passage, he cited, as part of the Author's text, quotations from the opinions of Judge-Advocates-General; and a little later, in the course of the same charge, he quotes, as the Author had done, the opinions of Hallam, Lord Campbell, and Lord Cottenham, to the like effect, and he might have quoted that of the illustrious Chancellor Kent.

So the Lord Chief Justice, not aware apparently of the weight of judicial authority (*a*) upon which the Author had written, condemned certain propositions of his, following

law, and is simply a reproduction of the opinion of Hallam, and of Kent, and of Lord Campbell, and Lord Cottenham. The Lord Chief Justice can only say that "he thinks Mr. Hallam is in error;" but the weight of authority is so overwhelming that he must not be surprised if people adopt another hypothesis.

(*a*) Thus, even as to *regular* courts-martial, Lord Loughborough says in *Grant* v. *Gould*, 2 H. Blackstone's rep. 68, that courts-martial are not bound by all the rules of evidence as courts of law are; adding, "It would be extremely absurd to expect the same precision in a charge before a court-martial as in a conviction before a magistrate." And they are not bound by all the rules of law, which prevail in the common law courts (*Rex* v. *Suddis*, 1 East rep. 327). "The natural leaning of the courts of common law," it was said, "was in favour of prisoners, and judges gave way too easily to formal objections on the part of prisoners" (*ibid*). So as to amount of proof, the common law requires that it should be conclusive; and thus, for instance, Lord George Gordon escaped, although the case was clear (*Rex* v. *Lord George Gordon*, 2 Doug. 592). But in several cases in our courts it has been laid down that there need be no formal trial, but only such an honest examination of the *case as the circumstances will admit of* (*Wright* v. *Fitzgerald*, 29 State Trials, 760; *Wall's Case*, 28 State Trials, 591). It was in the spirit of these authorities the Author wrote. The Lord Chief Justice, without noticing these authorities, censured him for so writing in accordance with them, and seems to have supposed that the Author meant that substantial proof should be dispensed with. Nothing was further from his intention. He was speaking in the spirit of the authorities he cited, and of the dispensation of strict and formal rules of proof. Any apparent departure from that principle must be ascribed to misconception of his meaning or to incorrectness of expression. He distinctly wrote that there ought to be "the *most careful inquiry* that can be made under the circumstances."

Author does not think that this would be a just construction, even of any isolated sentences torn from the context; but of this he is sure, that it would not be the construction to be drawn from a fair and candid consideration of the entire passages in which they occur; at all events, coupling them with other passages, in which he speaks clearly and strongly of the necessity for a grave and careful inquiry in every case of capital or corporal punishment. But the truth is, that the Lord Chief Justice entirely mistook the scope and object of the Author's observations upon this matter, which was not what should be done, but what had been done, and not its propriety, nor even its legality, but its legality with reference to *criminal liability*. And he very distinctly laid it down that, in matters of this nature, more especially when human

the Author might easily have gained a little cheap credit by professions of humanity at other people's expense, he did not think it generous at that moment to say anything which might tend to increase the weight of obloquy under which the Governor and officers were then labouring. But as his ideas upon the subject have been so misapprehended, as were those of the Governor, an account of matters as to which neither of them knew anything until the enquiry by Commission, he feels it his duty to declare that there are cases in which men were executed apparently without evidence to connect them with the rebellion—or, indeed, of any criminal offence whatever; cases which (unless there were circumstances not on the notes), no man can contemplate without pain; and though he rejoices to think with the Commissioners that these cases were not only few, but were the exceptions, yet such cases ought not to occur under a humane and careful execution of martial law; and their occurrence shows a grave want of care, not only upon the part of the particular officers who sat on the court-martial, but, what is far more important, upon the part of the Commander-in-Chief, whose duty it was, as the Author conceives, and as the Commissioners seem to have thought, to revise and reconsider their findings. And it is only justice to the Governor to say, that not only in fact did he know nothing of these cases, but that, according to the view of the Attorney-General and the military Commander, he had no right or power to interfere; for which reason the reports did not go to him. For the future, this is to be altered; by the official opinions of the Secretary of State, and both the Governor and the Commander will be held responsible, upon which, it follows that the reports must go to the Governor as well as the Commander. But it was not so considered *at the time*.

most monstrous notion, which, of course, receives no countenance whatever from the charge of the Lord Chief Justice, who indeed said, as the Author had said, that there might be a degree of insufficiency, an utter absence of evidence, which might, with other circumstances, be evidence of that recklessness which, beyond all doubt, would be legal malice, and amount to murder. But to argue that an execution on insufficient evidence was not necessarily murder, nor even necessarily illegal, was widely different, indeed, from suggesting that executions might properly take place without sufficient evidence. In everything said on that head, the Author presumes to say he entirely concurs with the Lord Chief Justice (who does, indeed, only echo the language held in many places in his book); and he ventures to add, that he would be willing to lay it down broadly, that the haste and excitement under which executions under martial law must necessarily take place, renders it more important that the offences charged should be *open and overt acts*, and that the evidence should be clear and conclusive, and that, under martial law, cognizance ought only to be taken of such cases, and not of cases of doubtful or constructive guilt. And such, indeed, seems to have been the intention of the Governor and the Commanders, only, through a want of due *supervision*, the principle was not carried out.

What the Author had to deal with in his former work, was the law of the matter, and such law as appeared to arise upon a general knowledge of admitted facts, as, for instance, the powers conferred by martial law, the constitution and jurisdiction of courts-martial, and their legal liability, and the like, and he especially combated the

Governor (Ev. p. 682). At all events, the Author desires to say that at the time he wrote his book, he was in the same position as the Governor when he wrote his despatches, that he knew none of these cases, and had only a general knowledge of the matter, sufficient for the purposes of legal discussion; upon which he presumed the military Commanders would see that the trials were reasonably just, and fair, and proper.

notion which, apparently, had got firm possession, not only of the popular mind, but even of many eminent persons, that the removal of a man into the declared district, for trial for an *offence alleged to have been committed there*, was necessarily illegal, a notion utterly opposed to one of the most elementary principles of criminal jurisprudence, that the locality of trial is to be regulated and governed by the locality of the offence. Upon these matters, strange as it may appear after the denunciations of the Lord Chief Justice, there is absolutely no difference whatever between his law, so far as he has declared it, and that which the Author ventured to lay down; at all events, no contradiction, except upon one point, upon which the Lord Chief Justice, it will be obvious, is wrong, viz., the notion that martial law means regular military law. For while, on the one hand, the Lord Chief Justice does not anywhere venture to declare that martial law, in time of rebellion, is not legal, and in many passages implies that it is, or may be so; on the other hand, he entirely adopts the principal propositions laid down by the Author, as to its jurisdiction, or its execution; as, that it may, in point of time, extend to acts of incitement to the rebellion, although the party might have committed no overt act since the declaration of martial law; and that, as regards locality, it is the locality of the act, not of the person, which governs jurisdiction; and that even illegality of arrest or of custody does not affect legality of trial, if it takes place where, if anywhere, the act was in law committed; and that, as already mentioned, insufficiency of evidence does not necessarily amount to illegality or criminality (*a*). The adoption by the Lord

(*a*) If it did, what would become of jurors who find persons guilty of felony, as they often do at the assizes, against the express opinion of the judge, that there is not sufficient evidence to justify a conviction? The Author has himself known this occur several times, and the judge has nevertheless felt himself bound to record the verdict and pronounce sentence upon it, although he disapproved of it. Why? Because it was undoubtedly legal, seeing that the *jury* are judges of the fact, and there was

Chief Justice of the principal proposition laid down by the Author, and the absence of any explicit contradiction of any of them, has enabled the Author to endure, with much equanimity and resignation, the burden of his disapprobation upon matters as to which he was simply misunderstood.

But upon the only point on which there appears to be any direct inconsistency between the law of the Lord Chief Justice and of the Author; and on which the Lord Chief Justice has laid down the proposition that martial law means the application of regular military law, the Author has to point out not only that it is absolutely and legally impossible (statutes expressly limiting it to soldiers enlisted in the service of the Crown), but that the contrary proposition, viz., that laid down by Lord Brougham and adopted by *Simmons on Court-Martial* (*a*), that rebels in arms are liable to be treated as soldiers, and therefore liable to such martial law as applies to soldiers in mutiny, is clearly established, not only upon legal principle, but by the very nature of the case; for no one can deny that they are in point of fact soldiers, though soldiers in arms against the Crown; and, that being so, having made themselves soldiers, it is difficult to see what they have to complain of, if they are treated as such. And not only so, but assuming that the proposition of the Lord Chief Justice is as right as the Author conceives it to be wrong, the Lord Chief Justice has so strangely mistaken what is the military

jurisdiction. Hence the Author put the question as to legality upon that foundation, and so does the Lord Chief Justice; and it may be added, that although the Royal Commissioners point out direct instances in which there was not sufficient evidence to warrant the finding (as to which most persons probably will agree with them), they do not say a word to imply that the sentences on that account were *illegal*.

(*a*) *Simmons on Courts-Martial*, 95. This proposition is as clear as anything can be in legal principle. In *Foster on Crown Law*, and all our writers on Crown Law, it is laid down that armed rebellion is war against the Crown; and this law was laid down by the venerable Lord Chief Justice Tindal in Frost's case.

law upon the subject, that it is upon every point exactly the opposite of what he supposes it to be. And it suggests the strongest reason for a candid and charitable consideration of the conduct of a Governor or military officer, under the pressure and excitement of a terrible emergency, to find that the Lord Chief Justice of England, after a year and a half for reflection and research, in laying down the law upon a charge of murder, should fall into such entire error, and give a direction to the jury, as to finding a bill, upon the theory of a want of jurisdiction, founded on notions of military law entirely erroneous (*a*).

If, however, martial law *has* that meaning, which, according to all the authorities it hitherto has had, then, no doubt it is, except in Ireland and India, left wholly without

(*a*) The Lord Chief Justice supposes that in our foreign dominions a general court-martial to inflict a sentence of death must be composed of the regular number of officers; but the Articles of War make *express provision* for the case, and allow of the court being constituted of only *three* officers, as was done in Jamaica. Again, he tells the jury that at all events it is clear the whole thing was wrong, because it was a mixed court composed of naval and military officers. But again, the Articles of War expressly provide for the mixture of officers of the marine and land services. Again, the Lord Chief Justice conceives that the oath on courts-martial, being always the same, must refer to the Articles; whereas, it expressly provides for cases not coming within the terms of the Articles (as must be the case with civilians) by the alternative words, "according to their conscience, or the custom of war." And the Lord Chief Justice, who thinks the trial of civilians for civil offences before military tribunals must be wrong, does not seem to be aware that there is an Article which provides that in any of our foreign dominions, where there is "no civil judicature in force," soldiers may be tried for civil crimes before courts-martial; and in *Simmons on Courts-Martial*, this enactment is construed as applying to the case of a rebellion, because when there is thus a suspension of the civil judicature, it cannot be said to be "in force," and because rebels in arms are soldiers, not the less so because they are also traitors. The terms of the enactment no doubt apply only to enlisted soldiers, but its spirit and principle are only carried out by the declaration of martial law and its application to civilians in rebellion. For soldiers are not the less citizens and free subjects, and can only be deprived of their rights as such on the ground of necessity. Again, the Lord Chief Justice implies that courts-martial even under martial law are bound by the rules of evidence under our own courts, whereas the contrary has been solemnly decided in our

regulation or restraint (*a*), except, perhaps, that, in some colonies, as in Jamaica, conditions are imposed on the power declaring it; and no doubt it would be well that, whether by Imperial Act, or by instructions from the Crown, it should be limited, regulated, and defined; and the Author concurs in that view, for the very reason, that he believes that, at common law, it is absolute. His former work was written to describe martial law as he believed it to be. In this, he ventures to suggest how martial law may be limited, regulated, and restrained, with reference to the power of declaring it, the acts or offences of which it ought to take cognizance, the procedure which ought to be pursued, or the penalties which ought to be inflicted.

Whether, however, this be done by means of legislation

own courts, *even if regular courts-martial*, in one of the very cases he cited (*Grant* v. *Gould*, 2 Hen. Blackst. 96). And he will have it that drum-head courts-martial in the field are illegal, whereas the contrary is laid down in all books of military law, and has been laid down in a court of law (*Governor Wall's case*, 28 State Trials).

(*a*) The Articles of War, which form the only definition of offences cognizable by military law, and the Queen's Regulations, are the only instructions issued to the British Army in general; but as to the Regulations, they relate only to suppression of disturbances or riots, and the Articles of War are in their terms entirely military. They include a number which are no offences at all by the common law, and render others, which at common law are mere misdemeanours, capital. Thus, for instance, the offence of sending intelligence to an enemy, that is, to a rebel, is by military law capital. They are only capable of being applied to the case of civilians in rebellion, by a sort of rough analogy, according to which, for instance, offences cognizable under martial law are—intelligence with the enemy or rebel, concealing letters or messages from or relieving an enemy or rebel, mutinous assemblages, and seditious or mutinous words, concealing traitorous or mutinous designs, or not endeavouring to suppress them, or coming to the knowledge of any intended mutiny or rebellion without giving notice thereof, &c. (*vide MacArthur on Court Martial*, vol. i.). It is obvious that in all this, then, there is room for great uncertainty. The Author did his best to draw out from first principles, and rude analogies, and some authorities, what martial law really was, and if he was inaccurate, the fault surely does not lie with him, nor with the military service, but with Parliaments and Governments, which have allowed the military service to remain under the impression that martial law meant absolute military authority. If it is not so, why is it not defined?

or instructions from the Crown, they must proceed upon some intelligible basis, and must depend upon the view taken of martial law. If there is no such power in the Crown to declare martial law—as all authorities have asserted there is—then any measure must be legislative, and must create such a power before it can be limited or defined; but if there be such a power, then the Crown can limit and regulate it. Again, if it does not include, or may not include, in cases of great public peril, the power of using deterrent measures, by speedy trial and execution of those who are detected in aiding the rebellion, as all writers on the subject have supposed, then such power, before it is regulated, must be *conferred;* but if it does include such power, it may easily be regulated and restrained by instructions from the Crown; and it is here, indeed, that the scope for regulation chiefly, if not entirely, arises. For as to operations in the field, it is obvious that, in their nature, they hardly admit of regulation, beyond the regulations already in existence; and, on the other hand, they hardly *require* regulation; for, of course, those who meet the Queen's forces in the field must take the consequences. It is, at all events, only as to the mode of dealing with prisoners that the necessity for regulation mainly, if not entirely, arises. And it is here that the difficulty and embarrassment arising from want of regulations were most felt.

It is most necessary, with a view to any future regulation of the subject, to have regard to what really are, according to the highest authorities, the powers of martial law. In considering, however, what martial law may be, as regards civilians, it is obvious that it is necessary first to settle what it is as to soldiers; for martial law, in rebellion, if it affects civilians, must be by the application to them of that martial law, whatever it may be, which is understood as applicable to soldiers. Upon the determination of this question must depend the question of procedure, the constitution of courts-martial, and the like. The Lord Chief

Justice, under the notion—opposed to all the authorities (*a*)—that martial law, as to soldiers, means regular military law, strongly suggests, though he does not venture distinctly to lay down, the conclusion that it is so.

But if martial law as to soldiers is *different* from ordinary or regular military law, then its proclamation or publication, as against the population in general, must mean the same thing. And it must extend to all who are in rebellion, or it is nugatory. But if civilians are subject in such a case to courts-martial, then, as the Articles of War do not apply to them (*b*), the rules of regular courts-martial cannot possibly be applicable to them, and their trials are left to the custom of war and natural justice.

The question, therefore, as to what martial law really is,

(*a*) "The military law, as exercised by the authority of Parliament, and the Mutiny Act annually passed, together with the Articles of War, is not to be confounded with that different branch of the royal prerogative called martial law, which is only exercised in the emergency of invasion and insurrection or rebellion" (*MacArthur on Court-Martial*, 1). Thus, Simmons states, that courts-martial are regulated by the Mutiny Act, and the Articles of War, and general orders, and that their practice is moreover regulated on *points where that law is silent*, chiefly by the customs of war, *i.e.*, the usages of the British Army (*Simmons on Court-Martial*, p. 87). So it is laid down in that work, p. 97, that, "The proclamation of martial law *renders every man liable to be treated as a soldier*," that is, amenable to courts-martial under the orders of military authority (*Simmons*, 14, 97).

(*b*) The Lord Chief Justice himself quotes the 152nd sec. of the Articles of War, "That no officer can sit on a court-martial without taking an oath to administer justice according to the Articles of War and the Mutiny Act; and if *any doubt shall arise not explained* by the Articles of War, then according to his conscience and the best of his understanding, and the custom of war in the like cases;" which the Lord Chief Justice, in the teeth of its terms, interprets to mean according to the Articles and the Act, whereas it supposes a case where by reason of some doubt they are not applicable, which must be so in the case of civilians, for the terms of the Articles and Act only apply to soldiers; and so Simmons explains it, that in cases where the Articles are silent, the officers must be governed by the "custom of war." Now, this must be so in the case of civilians, as to whom there is not a word in the Articles or the Mutiny Act. If, therefore, civilians, in other words rebels, are to be liable to martial law in rebellion, and if not, then it is utterly useless, then of necessity it follows

or authorises, appears to resolve itself into this: whether it can be applied to rebels for the suppression of a rebellion which cannot otherwise be suppressed? For it is admitted on all hands, that the declaration of martial law can only be justified by paramount necessity; and in a rebellion of civilians, unless it can be applied to civilians, it cannot be applied at all. The question, therefore, appears practically to answer itself, for, in the only case to which it applies—a case of paramount necessity, that necessity admits of no argument, and overrides all law. And if it is necessary to apply martial law to civilians in rebellion, and regular military law is not legally applicable, because it is by statute limited to soldiers, and is not actually applicable, because the circumstances of the case will not admit of its application (for which reason war dispenses with it, even as to soldiers), what remains, but that they are temporarily subject to absolute military law? Soldiers are not the less citizens, and entitled to the rights of citizens than others; and of those rights they cannot be deprived, except upon the ground of a paramount necessity, with reference to the safety of the community. The same necessity which alone can justify their being put under military law at all, may well enough be deemed to dispense with its formal rules, which, indeed, are never, in war, applied to them, and are not legally or actually applicable. Whether the application of martial law is legal, is a question which underlies any consideration of rules to regulate or restrain it, and must depend on first principles, and on the nature of the powers of common law and military law, which the

that they, the rules of regular military law, cannot possibly be applicable to them, and that they are to be dealt with, as martial law now stands, by the "custom of war." This is so, it is admitted as to soldiers, in time of war; and there is no great reason why the loyal soldiers of the Crown should be under a more rigid rule than rebels in arms against the sovereign. But then, on the other hand, this raises an intelligible ground for regulation. The Lord Chief Justice is, the Author thinks, mistaken in supposing that in the Ceylon case the courts were instituted as regular courts-martial. The great objection was that they were not.

for he strenuously insists that martial law, when valid, is to be deemed regular military law, in which, for the reason already given, it is conceived that he is in error; but which indicates the due appreciation of the importance of the restraints imposed by military discipline and military law.

So on the cognate subject of trials by court-martial under martial law, in the view of the authorities, and of the Author, they are to be regarded rather as protective of the subject, than to his prejudice. They interpose *some breathing time, so to speak, amid the wild excitement* of the moment, some check upon unbridled massacre, some opportunity for reflection and selection, and for the exercise of clemency and humanity, and they tend thus, if rightly regulated, to the diminution, and not to the augmentation of the sacrifice of human life. It is in that spirit they have been spoken of by the courts on all occasions on which they have had to allude to them, not merely as a means of punishment, but as a restraint or limitation on massacre (*a*). It was in that spirit the Author intended to speak of them; and he has been surprised to find it supposed that he meant anything else. The Lord Chief Justice says that quarter may be refused to rebels; that is, that a rebel who throws down his arms and offered to surrender himself prisoner, may be slain in cold blood. The Author protests against this as contrary to law, and, at all events, it is so contrary to humanity, that he is quite sure (applying to the Lord Chief Justice a larger measure of candour than the Lord Chief Justice has afforded to him), that the Lord Chief Justice, though he imagines it *may* lawfully be done, does not mean that it *ought* to be done. But to prevent its

(*a*) Thus the late Mr. Serjeant Spankie, in his admirable comments on the Indian Regulation, already alluded to, says, that trial by court-martial is calculated to prevent military severity in the field, becoming absolute massacre (*Hough's Military Law*, 344). So the court in *Wright* v. *Fitzgerald*, 289, Sta. Tri., and in *Governor Wall's Case*, 28, *ibid*, laid it down that there ought always to be an inquiry, even in the case of open mutiny.

Royal Commissioners (*a*), so much valuable instruction and monition, that should such occasion ever arise again, as it

(*a*) Thus, Mr. Cardwell, in his final dispatch upon the subject, lays down in clear terms the governing principles. "Future good government is not the object of martial law. Example and punishment are not its objects, its severities can only be justified when, and so far as, they are absolutely necessary for the immediate re-establishment of the public safety." Next, in accordance with the Report of the Royal Commissioners, he laid down the great rule, that though the "measures of severity, when dictated by necessity and justice, are in reality measures of mercy," yet, on the other hand, "that the course of punishment should be arrested as soon as possible, and should be confined, meanwhile, to ascertained offenders, and to cases of aggravated guilt. And that no time should be lost in checking, at the earliest possible moment, those measures of instant severity which only an overwhelming sense of public danger justifies, and in returning to the ordinary course of legal inquiry, and of the judicial trial and punishment of offenders." Further he laid it down that when a Governor has been compelled to proclaim martial law, "it is his bounden duty to restrain within the narrowest possible limits the severities incident to that law, and for that purpose to keep himself constantly informed of what is taking place under it. In the first alarm of such a disturbance, it cannot be expected that it will be possible for him to restrain all persons acting under martial law within the bounds which his own discretion would prescribe; but if it were deemed necessary to continue martial law, it was the duty of the Governor to inform himself of the character of the proceedings taken, and to put an end to all proceedings which were not absolutely necessary, and therefore justifiable on the ground of necessity. Her Majesty's Government cannot, therefore, hold the Governor of the colony irresponsible, either for the continuance or for the excessive severity of those measures." Mr. Cardwell, indeed, added with characteristic candour, "I think it is due to Mr. Eyre that I should accompany this observation by the statement that, in the instructions to Colonial Governors, no reference is made to the possible occurrence of such an emergency as that in which he was placed. How far it may be possible to frame general instructions which might assist the Governor in the case of future disturbances arising in any colony, is a subject which will receive careful consideration at the hands of Her Majesty's Government. You have justly observed how much easier it is to decide such questions after than before the event, and that sometimes the success of the measures adopted for the prevention of an evil deprives the authors of those measures of the evidence they would otherwise have had of their necessity." But it may safely be said that his own admirable despatches have gone far to supersede the necessity for any such instructions, and that in future Governors having all the advantages of these ample materials for guidance, and of the wisdom which, as Mr. Cardwell truly says, "comes after the event," must be dull indeed if

is to be hoped it will not, there are ample materials for the guidance of Governors of colonies on any future occasion.

In these despatches, the principle was laid down that the Governor will be held primarily responsible for the declaration of martial law, and will be bound to keep himself fully informed of the manner in which it is executed. It is the duty of the general in command of the forces

they do not profit by it. Next, he laid it down that if martial law was allowed to continue, instructions ought to have been issued to the officers to whom the actual conduct of the operations was entrusted. And, further, he indicated distinctly in a previous despatch the nature of the instructions which ought to have been issued by the military Commander, inquiring whether any and what oral or written instructions were given to officers in command of detachments sent in pursuit of rebels, whereby they might know on what evidences or appearances, other than hostile action or attitude, they were to assume, that those whom they might meet with were rebels; and whether those officers, or any of them, were led by their instructions, or otherwise, and without authority induced to assume that all persons flying or hiding from pursuit, or all persons found with plunder, or all persons leaving their labour on plantations, were to be regarded as rebels and shot when met with. Copies of all written instructions should be furnished." He also indicated clearly in the same despatches the nature of the information which a Governor in such a case will be expected to acquire, and to be able to afford as to the execution of martial law. "1. The number of persons tried, and of those sentenced by courts-martial, specifying the charge and sentence, and whether or not the sentence was executed, and under whose authority, and whether minutes were taken of the evidence on which the sentence was founded in each case; all minutes of evidence so taken to be appended to the return. The return should show also at what places and times respectively the offences were charged to have been committed, and the accused persons were arrested or captured and tried, specifying in each case whether the offence was committed before or during martial law, whether the arrest or capture was made during martial law, and in a place to which martial law extended; and if the person accused was arrested or captured in a place to which martial law did not extend, and removed to a place to which it did extend, there to be tried by martial law, and for an offence not committed during and under martial law, it should be stated by whose authority this was done, and whether under the advice of the Attorney-General of Jamaica. 2. Whether any persons were hanged, flogged, or otherwise punished without trial, and if so, by whom and under whose authority, in each case specifying the name, sex, colour, and quality of the person punished, the nature and date of the punishment, the nature and date of the offence, and the grounds on which it was assumed to have been committed. 3. The number of persons,

engaged in the suppression of rebellion, to give directions to the officer as to the mode in which they are to act (*a*). And many of the directions which were given were so excellent, that though they unhappily came a little too late on the particular occasion, owing to the sudden nature of the emergency, they contain in them the elements of all that can be required in the way of regulation or restraint in the execution of martial law. Taking these orders,

so far as can be ascertained, who were shot in the field or in the bush, their names, sex, quality, and colour, and whether adults or children, specifying in all cases whether they were resisting or flying, whether armed or unarmed, and if armed, with what weapons, whether such as are used only for the purposes of offence, or such as are used also in agricultural or other peaceful occupations."

(*a*) It is only just to this officer to state that many of the orders issued by the General in active command, showed an anxious desire to confine the acts of the military within the strictest limits of military discipline, and to take precautions against excesses or outrages by the soldiers, and some of these really are worth recording and preserving as useful cautions for the future. Order of General Nelson, 25th October:—"The officers commanding will respectively forbid any man to enter the house of anyone, under any pretext whatever, unless accompanied by a commanding officer. Any man found doing so will be handed over to the provost-marshal, for summary punishment." On the other hand, the brigadier-general, having received a complaint against the provost-marshal, near the termination of martial law, wrote the following: "Memo. for the provost-marshal. The provost-martial appeared to consider his powers more extensive than they are. He is simply entrusted with authority to inflict summary punishment on any individual whom he may detect in the commission of offences against order and discipline, and this is only to be exercised upon the commission of any particular offence which may call for an immediate example. No one knows better than myself the necessity, under past circumstances, for speedy action by the provost-marshal—these now are passed. I, therefore, peremptorily forbid any summary punishment being inflicted within the camp henceforth; and all cases of serious nature are to be referred for my decision, or that of my A.D.C., to whom alone I shall delegate authority to dispose of such.—A. A. Nelson, Brigadier-General Commanding Field Forces, Morant Bay, 6th November, 1865." This letter was inserted by the Commissioners in their report. Thus, on the 2nd November, in his order to an officer who was to relieve a detachment:—"It will be necessary for you to exercise strict control over the men of your detachment, and not to permit any man to quit his quarters for the purpose of foraging, &c. You are not

along with the despatches of the Secretary of State, there really is little left to desire for the purpose of future guidance. And one object of this publication is to collect and embody these valuable materials for guidance and judgment on the subject, so that the advantage thus capable of being derived from the experience so unhappily acquired, may not be entirely lost. After all that has occurred, there is little reason to fear any serious error will in future be committed on the side of excess.

In justice to the Governor and the military Commander in the Jamaica case, it should be stated, that it was the opinion, on the one hand, of the military authorities, and, on the other hand, of the legal advisers of the Governor (*a*),

sent to your post for the purpose of punishing the negro, but to maintain order, and to afford protection to the inhabitants generally. You are not to inflict summary punishment if any supposed rioter be sent as prisoner to you; be good enough to inquire into the case, and if you consider the same as of a serious nature, send him to my head-quarters, with the evidence against him. You will doubtless have many prisoners brought before you, and many possibly through the animus of the inhabitants. Petty cases of larceny I cannot interfere with; they must hereafter be dealt with by the civil authority. I am quite aware you will be much pressed to administer punishment to supposed criminals, and you must be firm, temperate, and judicious in all communications with civilians. You are not, on any account, to march out for the purpose of attacking anybody. The rebels, if reported in force, which I apprehend is quite impossible, must not be approached without my distinct order in writing. You will be pleased strictly to conform to the instructions herein, and any deviation therefrom will be a source of discomfort to yourself.—(Signed) A. A. Nelson, Brigadier-General Commanding Field Force."

(*a*) Thus the Attorney-General of the colony, in his evidence before the Royal Commission, said, the Governor makes the requisition for troops, and the general carries it out in detail. "I am of opinion that the Governor was the supreme authority during martial law—my opinion is, that as soon as the Governor gave orders to the General to go to the proclaimed districts, the Governor was relieved of the personal responsibility, and that he handed over the districts in question to the military. I regard the General in the field as being the supreme military authority." That is subject, of course, to the Commander-in-chief of the colony. Though the Commander-in-chief, General O'Connor, spoke of it as a question on which lawyers were divided, his own conduct showed that he did not deem it doubtful, for he and the General in command within the

that the direction of all measures taken in the execution of martial law, rested with the military Commander, subject to the Commander-in-chief of the island; and that the latter issued no definite instructions or directions, while, as to the military Commander in the district, who might naturally enough await such instructions, although at first, partly perhaps from this cause, and partly from the excitement which prevailed, he did not issue specific instructions, he did afterwards issue some very excellent instructions: some of which are quoted with approval by the Royal Commissioners, and which are collected in these pages. And as there is no reason to doubt, that, but for the suddenness of the emergency, more definite instructions

district, declined to try prisoners by court-martial, whom the Governor *desired* to be so tried, but whom they considered not to be within their jurisdiction, who reported on all occasions to the Commander-in-chief. But the Commander-in-chief admitted that he had given no particular instructions to the General in command. The Governor, who always acknowledged the evils of martial law, was sensible of these difficulties. In a despatch to the Secretary of State, he said: "It is probable that some occurrences may have taken place which cannot be justified during the prevalence of martial law, and where so much was necessarily left to the discretion of, or where an unforeseen responsibility was by circumstances forced upon, subordinate authorities. Such cases can only be sincerely deplored. It would have been impossible, under the excitement and urgency of the circumstances attending the outbreak, to have guarded against them." This language implies that if possible they ought to have been, and that but for these circumstances they would have been, guarded against; and thus it follows that on any future occasion they would be guarded against, by the light of the construction thus unhappily derived. In another despatch the Governor said, "No complaints were made to me of the officers in command during the whole period of martial law;" and he then proceeds to relate instances in which abuse had subsequently come to his knowledge, and in which he had taken measures for punishment on inquiry. He would naturally rely on the officer in command, being advised by the Attorney-General that he was responsible. Mr. Cardwell, in his final despatch, states that "It appears that Mr. Eyre was only very generally informed of the measures actually taken, and that the details were reported to the Commander-in-chief, and only partially came under his own notice in a general manner." And the Commander-in-chief, on those reports, found no fault, and gave no directions for the future. However, the Secretary of State has laid it down that it is the duty of the Governor

would have been issued; so on any future occasion that might unhappily arise, as there would be the benefit of the warning conveyed in these unhappy events, so there would be the advantage of all the useful instructions issued—it may be too tardily—on that occasion.

The Lord Chief Justice adverts to the statutory declaration of the "undoubted prerogative of the Crown for the public safety, to exercise martial law against rebels," and he deals with them in a manner scarcely satisfactory. He says, that there is a difference between a declaratory enactment and a recital or reservation, as no doubt there is, apparently not observing that these *are* declaratory enactments. He says, that if a statement of fact or of law be recited, as the foundation of legislation immediately following, it is not conclusive, as no doubt it is not; but then he fails to see that these are *not* such cases, but they are, in terms, formal declaratory enactments *following* legislation. Finally, he cites cases to show that on mere matters of property and private right, necessarily more or less matter of fact, as to which Parliament may be misled, or mere ordinary law between subject and subject, a reservation or saving clause is not conclusive. Why, no, certainly not; but does the Lord Chief Justice of England see no difference between such cases, and cases in which Parliament, as the great source and guardian of constitutional law, solemnly affirms and asserts the *prerogative of the Crown* for the public safety, and *declares and enacts* that this prerogative shall not ever by its own legislation be deemed in any degree to be limited or restrained!

to make himself acquainted with all the measures taken; and he wisely said, the chief anxiety of the Government is for the future. Any anxiety on that score may reasonably be allayed by the recollection of the care and attention with which no doubt his despatches on the subject will be regarded by Colonial Governors, and for which purpose the principal passages in them are carefully embodied in this work.

(*a*) The 43 Geo. III. c. 117, *declared and enacted* that nothing shall be construed to abridge or diminish the *acknowledged prerogative* of the Crown for the public safety to resort to the exercise of martial law against open

The Lord Chief Justice admits, indeed, that so emphatic an expression of the opinion of Parliament is certainly entitled to great and respectful consideration: "but that it cannot prevail against truth and fact, if a thorough investigation of the subject should lead us to an opposite conclusion, and satisfy us that Parliament has formed an unsound opinion upon it." But then, after a year and half for "thorough investigation," the Lord Chief Justice goes on to avow, not that the result has been to "lead his mind to an opposite conclusion," but, on the contrary, "that it has left his mind in doubt:" that is to say, he cannot venture to say that Parliament and all the eminent constitutional and legal authorities were not right after all; and then he proceeds, in this state of doubt, to *leave to the jury* (*a*) the matter of pure law, on which he had not been able to make up his own mind, and to leave them to overrule the law as declared by the Imperial Parliament and laid down by the greatest lawyer of the age, and which he himself wisely would not venture to overrule.

It might, indeed, be considered that Parliament, the Great Council of the realm, was the highest possible authority on a subject of constitutional law, and that what it

enemies or rebels. And the 3 & 4 Wm. IV. c. 40, s. 40, *declares and enacts* that nothing in the Act shall be construed to take away, abridge, or diminish *the undoubted prerogative of the Crown* for the public safety, to resort to the exercise of martial law against open enemies or traitors.

(*a*) If you are of opinion, upon the whole, that the jurisdiction to exercise martial law is not *satisfactorily made out*, &c. (p. 155). If then, *upon a review of the authorities*, and of the enactments of the statutes, and the *recognition of the power of the Crown in the Acts of Parliament*, you think the case ought not to be submitted to a jury, &c. (*ibid*). It may be that all I have said upon the subject of the law will leave you, *as I own candidly* it still leaves me, in some degree of doubt (*ibid*). This avowal breathed the spirit of candour of the Lord Chief Justice; but it may, perhaps, with all respect, be suggested, that if indeed his mind was in doubt, it would have been wiser to take the law as thus declared by Parliament, and by all the great lawyers and statesmen from the time of the Revolution to our own day, and not, on the one hand, use language calculated to unsettle only to disturb, and on the other hand, allow himself an unusual license of denunciation against a legal writer who followed these authorities.

solemnly declared and enacted ought to be deemed conclusive on the subject. And that, above all, what it thus solemnly declared and enacted of the royal prerogative, for the safety of the realm, might safely be trusted as decisive. At all events, it is impossible to imagine any higher or loftier authority, or any better or higher evidence of what is the law on such a subject than these solemn declarations of Parliament, with the assent of all the great statesmen and lawyers who at different times have sat in it. And when it is added that these solemn and energetic legislative declarations were but in affirmance of the doctrines laid down by legal and constitutional writers, and in legal text books of the highest authority, it does seem almost a reductio ad absurdum to suppose that all this accumulative authority is arrayed on the side of error. And it is not wonderful that the Lord Chief Justice of England should shrink from placing himself in direct opposition to it, and should not venture to say that it is error, or that martial law in time of rebellion is not allowable by the common law (*a*).

Nor can there be any doubt, at all events, as to what Parliament understood by martial law, in suppression

(*a*) The nearest approach to any such declaration is a statement in extremely guarded terms, that "since the Petition of Rights, martial law has not been exercised in England by virtue of prerogative," which last qualification is, no doubt, introduced to cover the undoubted use under the Commonwealth. But this is rather an historical than a legal proposition, and even with that qualification it is inaccurate, for on the occasion of the Lord George Gordon riots, the Crown declared the tumults rebellious, and directed the military to act without the civil authority, and they did act—not, as at common law, merely in resistance or prevention, but slaying the people wherever they found them assembled, which was war, and unlawful at common law. And though Lord Mansfield tried to persuade the House of Commons that this was not martial law, they knew better, and adjourned; and Mr. Hallam justly derides the notion as sophistical. But setting aside this (to which, it is remarkable, the Lord Chief Justice does not allude), the Lord Chief Justice forgot that the common law in Ireland is the same as in England, and cannot deny that martial law has been declared there almost within living memory at common law, and that the Imperial Parliament not only never declared it illegal, but solemnly declared the contrary.

of rebellion, for having given power to exercise it in cases when it could not legally be declared at common law—and it was only for that purpose a statute was necessary—it went on to enact salutory regulations as to its exercise against all persons taken in rebellion, whether or not they were civilians; and, indeed, as already observed, in a rebellion of civilians it would, indeed, be idle if it were not to apply to the only class in rebellion. These positive enactments, at all events, are legislative declarations of the real meaning of martial law in rebellion, in any other sense than which it is absolutely idle and absurd.

The Author ventures to hope that he shall not be deemed presumptuous if he adheres to the doctrine thus asserted by all the overwhelming weight of legislative and constitutional authority, to which the Lord Chief Justice of England, after such ample opportunity for consideration, does not venture to oppose any decisive contradiction, and against which all his researches have not enabled him to produce an atom of authority. The Author, therefore, ventures to re-state his conclusions, and the grounds for those conclusions, and at the same time to suggest those regulations and restraints upon the exercise of martial law which the true conception of the principles of paramount necessity on which alone it is allowable appears naturally and reasonably to suggest. But, subject to these qualifications and restrictions, he ventures to reassert his fundamental conclusions, as not only not spoken but strengthened and confirmed by the elaborate disquisition of the Lord Chief Justice; that is to say, he presumes, in the language of Parliament, to assert "the undoubted prerogative of the Crown to declare martial law for the suppression of rebellion;" and, in the language of our great constitutional historian, he asserts it to be "the suspension of civil jurisdiction."

Since writing the preceding pages a debate has taken place in the House of Commons upon the subject, the tenor and result of which has been substantially to confirm

the views which the Author has ventured thus to put forth; namely, that the charge of the Lord Chief Justice, which was supposed to have been so decisive against recourse to martial law for the suppression of rebellion, is not only not decisive of it, but rather implies its legality (*a*), and at all events leaves the question just where it was before, and that the doctrines maintained, on the highest authorities on the subject, are, to say the least, at this moment not contradicted by any judicial or legislative authority, and are, moreover, to be regarded as substantially established, so far as and so long as the exercise of martial law may be required and excused by a real necessity. And though the opponents of martial law professed to regard the charge as conclusive against the legality of martial law, they showed their own distrust of it by attempting to support it by historical misstatements of the most remarkable kind (*b*), and a resolution which would have falsified or altered the law of England on the subject, and which, therefore, the House of Commons declined to entertain.

(*a*) It is important to observe that the resolution was moved by an Irish member (Mr. O'Reilly), animated, as the Secretary of State observed, by a natural aversion to martial law, owing to the horrors and atrocities perpetrated in Ireland, and to which he thus adverted: "Within a very recent period the exercise of martial law had been attempted in one of our colonies. In Ireland it was called into operation in 1798, under what circumstances was stated in the Cornwallis correspondence. He did not like to enlarge on so painful a subject, or to revive reminiscences of evil times over which he should prefer to draw a veil; but the question had been raised in regard to Ireland, and in regard to the colonies, and it demanded an answer." That answer in effect was, that such atrocities were not martial law, but military license; that martial law was only exercised by and limited by necessity; and that if it was so limited, there could be no such atrocities, and that on the same principle of necessity rested its legality.

(*b*) The honourable member who moved the resolution stated that it was laid down in the Petition of Rights drawn up in 1627, and again in the Bill of Rights in 1688, "that none shall be forejudged of life and limb save by the judgment of their peers and the law of the land." But the Petition of Rights defines martial law as that which is used in armies in time of war, and does not say a word as to its illegality in time of war or rebellion; but, on the contrary, clearly implies its legality so far as regards rebellion and

On that occasion the views of the opponents of martial law were marked, as they always are, by that hopeless confusion and inconsistency which is the infallible indicative of error; and while repudiating martial law, they did so evidently under the notion that it was something which it is not, and that it applied after a rebellion was over. And they did not hesitate to follow the Lord Chief Justice in laying down something infinitely *worse*, and which would come to indiscriminating massacre; altogether failing to perceive that the great object of martial law is to prevent this. While loudly avowing that any measures might

rebels, and the Bill of Rights contains no proposition except that standing armies are illegal in time of peace, and the successive Mutiny Acts since that time state the proposition here cited as applying to time of peace. The only answer attempted to this, that this applies to soldiers, is inconclusive, for soldiers are as much free citizens as others, and can no more than others be deprived of their rights as such, except on the ground of necessity. The resolution moved was, "That whereas, by the law of this kingdom, no man may be forejudged of life or limb, but by the lawful judgment of his peers, or by the law of the land; and no commission for proceeding by martial law may issue forth to any person or persons whatever by colour of which any of Her Majesty's subjects may be destroyed or put to death contrary to the laws and franchise of this land, and the pretended power of suspending of laws, or the execution of laws by regal authority without consent of Parliament, is illegal; this House would regard as utterly void and illegal any commission or proclamation purporting or pretending to proclaim martial law in any part of this kingdom." But the Secretary of State declared that this resolution embodied doctrines which had never been affirmed *either by statute or judicial decision*. And the House declined to pass it. It is to be observed that one important point was settled in this debate as to the charge of the Lord Chief Justice, viz., that it was of *no judicial authority*. Of course, every lawyer was aware of this already, as it was a mere charge to the grand jury preparatory to a trial; and, moreover, every word in it on the subject was *obiter*, for he told the jury, contrary to the Report of the Commissioners, that at the time in question the rebellion was over. Of course, martial law, if that were so, must be illegal. But though at first it seemed to be supposed that the charge was of some authority, this was quite disproved by the Home Secretary (*vide post*), and Mr. Mill, the most determined opponent of martial law, frankly admitted that "the House knew that this charge to the grand jury was not law, and very good reasons had been stated, fairly enough by the Home Secretary why it should not be law."

be taken which were necessary, they failed to perceive that, on the one hand, this left the question all open, and that, on the other hand, if there be any "law" in the world which more requires regulation and restraint in its exercise than another, it is the "law of necessity," which, without regulation and restraint, must degenerate into anarchy and unbridled license; and that as measures of necessity must be upheld by military force, it can only be restrained by military discipline; and that, in short, martial law, or the law of war, is but the law of necessity exercised by military power, under military authority, and subject, rightly, to the most rigid restraints of military discipline. Indeed, it appeared to be implied that these measures ought to be taken under military authority and military law; and if so, that, as already shown, is all that is wanted in martial law (*a*).

(*a*) Mr. Forster, who had been Under Secretary for the Colonies, avowed that "he had never believed that martial law, as it was understood in this country, in Ireland, or the colonies, was necessary for the purposes of government in those places; adding, "In that opinion he *should no doubt be in a minority*, but having paid close attention to all that had happened in Jamaica, and having looked over all similar cases in recent history, he had seen no case in which the proclamation of martial law was a necessary evil." Which, it will have been seen, was contrary to the deliberate judgment of all the great statesmen of his time, including the leader of his own Government, so that the view of this honourable member may fairly be regarded as extreme. Yet "he admitted that to the restoration of peace and the preservation of authority, *everything else must give way, and that whatever acts of military authority were absolutely necessary for that purpose must be sanctioned;* but he had seen no case where what was embodied in the notion of martial law, the power of punishment after the suppression of the outbreak," was essential. But this was either confounding mere outbreak or outrage with rebellion, or it was mistaking martial law, which is limited to rebellion; only rebellion may last some time after actual outbreak and active resistance. "The Chief Justice had pointed out that within twenty-four hours after the issue of the proclamation, peace and order were restored in Jamaica, and nobody could doubt that peace would have been equally restored by the action of the troops, whether martial law had been proclaimed or not." Then, if so, martial law was unlawful; but that was a question of fact, on which the statement of the Lord Chief Justice was utterly contrary to the Report of the Commissioners, who gave *ten days* as the

It is most remarkable that on that occasion an honourable gentleman, who had been Under-Secretary for the Colonies, although most adverse to martial law, acknowledged that "*the doctrine of all our most eminent lawyers, at all stages of our history, had been that, if martial law were proclaimed, it meant military law, and the giving to military officers, with regard to civilians, those powers which they possessed with regard to their own services.*" This, it need not be said, is all that has ever been contended, and it is what the Author wrote his book to

duration of the rebellion. "Nothing could be stronger than the statement of the Lord Chief Justice as to the power of suppression reposed in the Government: 'a rebel in arms stands in the position of a public enemy, and therefore you may kill him in battle, or you may refuse him quarter, dealing with him in this respect as with a public enemy.' This showed that as long as actual rebellion was in existence martial law was not needed for the suppression of any disturbance. As to the allegation that the proclamation of martial law was necessary for the punishment of those who had taken part in the rebellion, such an argument showed that no real necessity existed for martial law at all." But if that be allowable, then it is still *more necessary for the sake of humanity*; and this, as already shown, is the basis upon which that sound lawyer, Mr. Serjeant Spankie, put the question, as a preventive of indiscriminate massacre. As the writer has already observed, he repudiates the notion that such a course as the slaughter of rebels who surrender themselves as prisoners is allowable; on the contrary, he declares it is as contrary to law as it is to humanity. And it is a remarkable illustration of the power of prejudice that a gentleman whose sense and humanity are so undoubted should adopt such a monstrous proposition rather than adopt martial law. Why, the very object of courts-martial under martial law is to restrain the indiscriminate massacre thus supposed to be allowed, and to afford some opportunity for enquiry and the exercise of humanity. And it has been laid down, again and again, in our courts, that no man can be put to death in cold blood, even in a mutiny, without *some grave and careful enquiry*, even although it be only by drumhead court-martial, which is rough justice, certainly, but surely better than none at all; so it was laid down by the court, in Wall's case, and so in *Wright* v. *Fitzgerald*, and it is in fact natural justice. Indeed, the honourable member went on to say, "There were two theories as regarded martial law. One appeared to have been *held by the principal lawyers in all stages of our history, from Chief Justice Hale to the present Chief Justice.* This was, that if by any unfortunate circumstance martial law was proclaimed in any part of Her Majesty's dominions, *it meant military law*, and the giving to military and naval officers similar powers with regard to civilians to

establish. For, although the honourable gentleman added that the result would be that courts-martial should be constituted as for the trial of a soldier; and seemed to assume, as the Lord Chief Justice had assumed, that this meant a regular court-martial, as under ordinary military law, he evidently was no more aware than the Lord Chief Justice had been, that military law allows of courts otherwise constituted, in our foreign dominions or dependencies; and that our courts of law, even in criminal cases, have recognised (*a*), in cases of mutiny or rebellion, even the rough and summary justice of "drum-head courts-martial."

those which they possessed with regard to members of their own services. The result would be a court-martial constituted under the same regulations as a court-martial for the trial of a naval or military officer." So that this, after all—which is martial law in effect—is admitted to be the law laid down by the most eminent lawyers in all stages of our history. For the hon. gentleman appeared, like the Lord Chief Justice, not to be aware that even the military law makes *special provision* for trial of offences arising in our foreign dominions with a less number of officers (only three), and composed of both services, exactly as was done in Jamaica. "That was one theory spoken of by the Lord Chief Justice; the other was that martial law applied to civilians is not military law, but the arbitrary will of the Executive. This latter theory the Chief Justice regarded as a heresy of recent growth, and it was no doubt the theory on which the Jamaica authorities acted, and also the theory on which the authorities in Ceylon and other places had acted before. This theory had high authority to back it; it was in accordance with the dictum of the Duke of Wellington, that martial law was the will of the General, and, in fact, meant no law at all." But that meant, as the Author expounded it, not *ordinary* military law; and the Lord Chief Justice, as already mentioned, in quoting his proposition, omitted that word, on which the whole question turned. In conclusion, the honourable gentleman said, most truly, "Surely, after all the centuries in which we had been labouring to protect subjects of the Queen from any exercise of arbitrary power, argument ought not to be needed for the purpose of combating the opinion that it was necessary to suspend the common law, not for the restoration of peace and order, but merely for the purposes of punishment." Nobody will dispute this; all that has been contended for is punishment during rebellion.

(*a*) The Lord Chief Baron, in Wall's case, distinctly recognised them as allowable on a sudden mutiny. So in *Wright* v. *Fitzgerald*, 27 Sta. Trials, the court spoke of any grave and honest inquiry, however irregular and informal, as sufficient, in actual rebellion. Of course this was limited to

In the course of the debate, the eminent person who, in 1859, had, in his official capacity as Judge Advocate-General, declared the law on the subject, in accordance with all the authorities, adhered to and affirmed that

such cases, and if all that the hon. gentleman meant was so to limit it, the limitation is undoubtedly correct. But it is evident that the admission of this virtually involves all that has ever been maintained as "martial law," and that profound thinker, Mr. Mill, at once perceived and exposed the inconsistency. For whereas Mr. Forster would allow of no trials merely for the purpose of punishment after the rebellion was over, Mr. Mill would not allow of punishment at all. For he appealed to the charge of the Lord Chief Justice as "an authority in support of views which some had taken from the very beginning of these proceedings. That for non-military persons there was no such thing as martial law, and that it had no existence except for military persons." The entire and hopeless inconsistency between this view and that of the late Under-Secretary, will be observed; but it may be added that there is an equal inconsistency with the charge, by which Mr. Mill must have been greatly misled, seeing that its tendency was this, that martial law did mean the application to civilians of military law; only regular military law. So hopeless is the confusion and the inconsistency in which the opponents of martial law are inevitably involved. But even this great thinker further said, "that while there was properly no such thing as martial law, there was no doubt a law of necessity, which required that certain acts should be done for the suppression of rebellion, but not for the punishment of the persons concerned in it." So that no deterrent measures can be taken to suppress a rebellion, and it is to be presumed that Mr. Mill differs from the Lord Chief Justice and Mr. Forster, and does not think that persons or rebels who surrender may be slaughtered. He added: "He and others contended that the law of necessity would justify the Executive in doing such things as were necessary to put down rebellion if no martial law existed, and that to get rid of their responsibility the Executive must show that the necessity existed, not to the satisfaction of courts-martial, but of the regular tribunals of the country"—which comes, as already shown, to the extreme view: "Do all that is necessary: shed blood to any extent you honestly think necessary; but mind, if you spill a single drop of blood, as we may think unnecessarily, you shall be hanged for murder!" How strange that so clear a thinker should not see the *reductio ad absurdum!* It is to be observed, however, that Mr. Cardwell, who had been Secretary for the Colonies when the Jamaica case occurred, expressed his adhesion to this view, in entire opposition to the view of the Lord Chief Justice, for he said, "There is, in certain painful and melancholy cases also another law, which might be called the law of necessity, and which nobody acted upon except under a very great responsibility, and the liability to render a

exposition of the law (*a*). He declared that the common law allowed of all measures which were necessary for the suppression of rebellion; and that, whether they were called measures of necessity or martial law, it was, in substance,

future account to the ordinary tribunals of the country." He added, "But those persons who, called upon by no act of their own, but for the protection of the public safety, took a great responsibility of that kind upon themselves, were placed in a position of extreme difficulty, and it often happened that, in order to protect them in a way which Parliament afterwards deemed just, a Bill of Indemnity was proposed, discussed, and passed on their behalf. That, however, was an act not of prerogative, but of Parliament, and until Parliament passed such a Bill of Indemnity in their favour, such persons acted, and ought to act, subject to a liability to account to the ordinary tribunals of their country. Believing that to be the law, and to be a wholesome state of the law, he did not think any alteration of it was necessary. But if the law did require to be altered, then he should agree that a bill should be brought in for the purpose, when the matter could be considered with the gravity with which a bill was always treated in that House. The law of necessity to which he had referred was, in his opinion, strictly limited in time, and operative only for repression, and not in the slightest degree for punishment; and in the memorable words of Sir James Macintosh, to continue to act upon that necessity, after the necessity itself had expired, was an enormous crime." That is, it is to be presumed, *wilfully* so to continue it. But this view, of acting on necessity, against law, and trusting to a Bill of Indemnity, is contrary to the view of the Lord Chief Justice, and the true view is that necessity gives authority, and the honest exercise of authority gives immunity (*vide Bishop's Criminal Law*, cited *post*).

(*a*) Mr. Headlam, the Judge Advocate-General, in 1859 (*vide ante* p. 10). The right hon. gentleman said, "He thought that the law of this country was not only amply sufficient to justify the Crown in taking sufficient measures for the defence of the realm, but that the Minister of the Crown would be liable to the gravest censure—would be liable almost to impeachment—if he neglected to take sufficient precautions for the defence of the country. In the present case a rebellion had taken place, and it was alleged that the power of the Governor had been over-exerted. He was, however, of the same opinion in the present case also, that it was not desirable to alter the existing law, and that it was better to leave it in the same state in which it had always been, the duty of the Government being to take care, in the words of the old Latin maxim, 'Ne quid detrementi respublica capiat.' The objections to the motion of the hon. member were, in his opinion, insuperable. Having laid down the law, the hon. member asked the House to affirm that 'this House would regard as utterly void and illegal any commission or proclamation purporting or pretending to proclaim martial law in any part of this kingdom.' Either such a procla-

the same; and a mere dispute about terms, a controversy about a name. And he, as all the more prominent and eminent persons who spoke in the debate, utterly declined to pass a resolution which declared the exercise of martial law to be illegal. And while, on the one hand, he was ready to consider any legislative measure for its regulation, he did not appear to think such a measure practically necessary.

On that occasion, the Secretary of State for the Home Department (*a*), a Minister admitted to be a man of

mation would be legal or it would not. If it were legal, what power had that House to make it illegal? If it were illegal, what advantage would there be in the resolution? The House in passing such a resolution would be doing something beyond its functions, and to which no court of law would pay the least attention. If the proposition in question embodied the true law of the land, that House would only be throwing doubt upon it by bolstering it up by a weak resolution on the part of one of the Houses of Parliament. If the hon. member proposed to alter the law, let him come forward and propose a bill, which he, for one, should be glad to consider with the greatest care. Whether they called it martial law or the law of necessity, it was precisely the same thing. If the Executive authority superseded the ordinary law of the country when a sufficient case of necessity arose, they were all agreed that it should be supported in that, and also that it should be covered by an Act of Indemnity afterwards. At the same time he was not prepared to say that they ought to fetter and control any such authority by declarations of that description. There were two distinct dangers before them. If they made precise declarations of that description they might fetter and control public men, and render them so timid in case of emergency that they would fail in their duty. On the other hand, they might pass enactments which would tempt weak men to exercise powers which ought not to be exercised unless absolutely necessary. Those were two dangers of a very different description, against both of which the House should guard; and the best way of doing that was by leaving the law as it was, and by making it perfectly clear to persons in authority that they must act in case of emergency and take responsibility upon their own shoulders, looking to an Act of Indemnity to exonerate them if they had acted honestly and in good faith. It was, perhaps, too much to expect men to act with perfect wisdom in every case, but if they acted in strict good faith and for the best they could not be fairly refused an indemnity afterwards. Whether such proceedings were justified by martial law or upon the plea of necessity, appeared to him a matter more of words than of substance."

(*a*) Mr. Gathorne Hardy, who is reported to have spoken to the fol-

remarkable ability, and a lawyer by profession, and who spoke with all the responsibility and authority which belonged to his high office, and with the assent of the great majority of the House, declared that "the resolution embodied *doctrines which were not laid down by any judicial decisions nor by any statute*;" and pointed out, that the opinions thrown out by the Lord Chief Justice were *only* thrown out with a view to further inquiry: that they were not definitely or decisively laid down; that they were of no judicial authority, being merely in a charge to a grand jury, with-

lowing effect:—While deploring the fact that necessity sometimes compelled the proclamation of martial law, he noticed that the honourable member had admitted the occasional occurrence of such a severity, nor did the Lord Chief Justice ignore the necessity which might arise of setting aside the law of the land and securing with great vigour the military law such as is enforced by a General in an enemy's country. The Lord Chief Justice, indeed, admitted that though an insurrection were suppressed, it might be necessary to continue the enforcement of martial law, in order to strike terror into the minds of the people for their better order in the future. Everyone was agreed that in cases of insurrection and danger to the lives of peaceful citizens, it was the duty of those exercising the supreme power to put aside the ordinary laws, and to proclaim military law until the insurrection was suppressed; and it did not need the existence of armed resistance to constitute insurrection. He knew of none who said that the Jamaica authorities who had been referred to were wrong in using in the first instance the most forcible means to put down the rising. And he thought that if an Executive were to act by military power, it would proceed in accordance with the ordinary law of the case, and *military force would involve military law*. If military force were adopted, it was surely fairer to announce to those against whom it was proposed to act that the ordinary course of law would be superseded? The first part of the hon. member's resolution was composed entirely of truisms, and with respect to the latter part, he thought it extremely unadvisable that it should be placed upon the books of the House of Commons. It was evident that the Lord Chief Justice himself had, he would not say vacillated, but gone from one side to another, admitting that the necessity had arisen for acting with peculiar rigour, or, in other words, with military law, and yet at the same time doubting whether the insurrection had not been suppressed at a sufficiently early date—a matter about which the authorities in Jamaica held a different opinion—to render the continuance of that military law unnecessary. He appeared, moreover, to have admitted that if the insurrection had been in existence, as it really was in the opinion of those in the colony, the employment of military law would have been necessary. In

out any argument; that they were, moreover, *obiter*, because thrown out upon the assumption (opposed to the Report of the Royal Commissioners) that the rebellion was over; and that they were at variance with the deliberate opinions of official men, and with the highest authorities upon the subject.

The practical conclusion, drawn by the ablest and most eminent men on this occasion, was substantially that at which the Author had arrived, in the foregoing pages, before the debate took place; and which, therefore, he may

page 127 of his charge, the Chief Justice said that he felt deeply sensible of the exceeding difficulty of his task, as he was without the advantage of having had the matter discussed by members of the bar. Now, if any one circumstance tended to add weight to the judicial decisions given in this country, it was the discussions by which they were preceded. Would it, then, be right that the House of Commons, in consequence, not of a judicial decision, but simply of a charge to a grand jury, qualified however able and learned, by those acknowledgments, should rush hastily to the conclusions embodied in the resolution moved by the honourable member. The learned Chief Justice has evidently been shocked by his view of what had taken place in Jamaica with reference to the particular case under the decision of the grand jury, and he placed before the grand jury not only the facts of the case, but also his opinion, with a view to its submission to the petit jury. Had the case been submitted to the petit jury, the law which the learned Chief Justice had laid down, would have been subject to the revision of the judges trying the case, of the criminal court of appeal, and finally a writ of error might have been brought before the highest tribunal in the kingdom." That is, supposing the case had remained in the Central Criminal Court, to which the Act for Reservation of Crown Cases applied. But if removed to the Queen's Bench, as it must have been to obtain a special jury, there could have been no review of the law beyond that court (*vide ante*). "The charge should, therefore, be taken with those qualifications, and surely, upon a direction to a grand jury made with a view to getting certain points afterwards decided by the law of the land, the House of Commons would not consent to place upon their books a resolution which would unjustly hamper those who might hereafter be placed in the position of executive officers, and whose duty it might be boldly to employ the powers at their disposal, in order to put an end to what might otherwise prove of serious danger to the State. The right honourable gentleman the Judge-Advocate of the late Government (Mr. Headlam) had, he knew, given great consideration to cases of this kind, and the opinion not only of the right honourable gentleman but also of a right honourable friend of his—a former Judge-Advocate, whose absence

venture now to state with more confidence: as what ought to be looked at now is rather the future than the past (*a*); viz., that, as to the future, if any occasion should unhappily arise, in any dependency or colony, to have recourse to measures for the suppression of rebellion, then, while, on the one hand, all measures which may be honestly deemed necessary will be justified; on the other hand, those measures, though necessarily taken by military force under military orders, should not only be subject to the restraints of military discipline and the

from the House he sincerely regretted (Sir D. Dundas), was contrary to that held by the learned Chief Justice. The learned Chief Justice, referring to these right honourable gentlemen, said it was not their peculiar business to enter upon questions of this nature. But, with all due deference, the attention of the learned Chief Justice himself did not appear to have been previously employed in this direction. As it was, *it could not be asserted that the doctrine embodied in the resolution moved by the honourable member was laid down by judicial decisions, or by the common or statute law of the land.* It would, therefore, he thought, be unwise in the House of Commons to commit itself to a pledge upon a matter so important. He trusted that neither in Ireland nor in the United Kingdom, nor in any of the colonies, would the occasion ever again occur for the employment of those powers which were necessary to the Executive in times of great emergency. At the same time he implored the House of Commons not to *place an impediment in the way of those who were acting in distant spheres, and to whom, with great responsibilities, was committed the duty of upholding the authority of the Crown and the rights of this country.*" In these views Mr. Cardwell, who followed, substantially concurred.

(*a*) Thus, Mr. Mill said, "He agreed that it would be well to consider this question with reference to the future rather than the past." This was what had been said by Mr. Cardwell, in his final dispatch in the Jamaica case; and he, on this occasion, observed that the pith of the question lay in the regulation and restraint of the exercise of martial law: "The chief and most fertile source of abuse, when the deplorable emergencies to which the motion pointed to occurred, was the fact that usually the inferior agents over whom the higher authorities were called upon in circumstances of extreme difficulty to exercise control, were guilty of excesses which their superiors would, *if they could, have been glad to restrain.* The adoption of a vague abstract resolution like the present one, however, instead of *strengthening the bonds of discipline, and increasing the control of the superior authority over its subordinates,* might rather have a contrary effect." (Debate, 2nd July, 1867). In this final observation is the key to the true view of martial law, which is the exercise of the great social law of self-defence,

CONSIDERATIONS

UPON

MARTIAL LAW.

THERE is no prerogative of the Crown so ancient, so important, and so undoubted, as that of preserving the peace of the realm (*a*). It is one of those things which prove

(*a*) It is thus emphatically laid down in one of our ancient statutes: "En primes voit le roy, et commande que la peace de Saint Eglise et de la terre soit bien garde et maintaine en touts points: et que common droiture soit fait à touts auxibien as poures come as riches, sans regard de nulluy (Stat. West. 1), which Lord Coke devoutly translates into Latin, and then comments on it thus:—"This is an ancient maxim of the common law, and Fleta recites this fundamental law in few words, 'Quod pax ecclesiæ et terræ inviolabitur observetur ita quod communis justicia singulis pariter exhibiatur.' And Britton saith, 'Peace ne poet my bien estre sans ley,' therefore the law, as a mean that peace may be kept and maintained, provideth that common right (*i. e.* justice) selonque ley et custome d'Angleterre soit fait a toute, &c. But this ancient law had great need to be rehearsed and commended to be put in execution, for that by reason of the often insurrections and intestine wars, the peace of the land was for a long time miserably disturbed; and the mischief was, that during these intestine wars law and justice lay asleep: for silent leges inter arma" (2 Inst. 161; Lord Coke's Institutes, v. 2, 161). From the very earliest origin of our liberties, it has been recognised that the discharge of this great duty justifies the Crown in levying war upon rebels, and thus, the very year after Magna Charta was solemnly confirmed by Henry III. (A.D. 1225), when a turbulent knight seized his judges and imprisoned them in his castle, the king at once levied troops and made war upon him, and having captured his castle hanged the whole garrison (*vide* Matthew of Westminster). This was contrary to the terms of the Great Charter (nullus liber homo destruatur, nec super eum ibimus, nec super eum mittimus, nisi per legale judicium, &c.); the obvious

themselves, which rest on first principles, and arise out of a manifest and unavoidable necessity. It lies at the very origin of society, and is the main object for which Government exists, and the law was established. It rests upon two grounds, the primary necessity for preserving order, and the duty which is thus imposed upon the Crown to maintain it. The duty in truth arises out of the necessity, and the right arises out of the duty, for the prerogative of the Crown, rightly understood, simply means the right of the Crown to do its duty. All its duties and all its rights arise out of necessity for the public weal, and this lies at the basis of them all. It is a duty which can only be undertaken by supreme authority, for otherwise the very efforts to effect the object would only lead to anarchy. It is, therefore, the first and most sacred duty of the Crown, and was its earliest and most important prerogative, for it involves, as a necessary consequence, the prerogative of levying war, or using armed force, if necessary, for the purpose. And that prerogative has been exercised at every

meaning of the words, 'nec super eum ibimus' being, we will not come upon him with an armed force, nor otherwise than by due course of law. And it was beyond all doubt contrary to common law, for Lord Coke and Lord Chief Justice Rolle laid it down, and it is undoubted law, that if a rebel be taken, he must at common law be tried. Nevertheless, neither at the time, nor ever since, was the act declared illegal; and it is perhaps the earliest instance of martial law recorded in our history. Martial law, be it observed, as pointed out in old books, is etymologically the *law of war*; and so its sense in history. All through our history, as long as it was necessary, this right was exercised in rebellion; in the earliest times, against turbulent and truculent barons; in the middle ages, against numerous insurrections of the serfs or villeins; but always without any doubt as to its legality. And though it has long ceased to have any practical importance in this country (whether or not it is legally abolished, as to which *vide post*), it must be remembered, that the circumstances in which this country was in early ages, are similar to those in which our countrymen are placed in many distant dependencies, surrounded by hostile races, all equally subjects of the British Crown, and equally under its protection, so that on the one hand the prerogatives of the Crown, so far as necessary for their protection, are equally valuable; and, on the other hand, legal principles can no more be violated there than here.

period of history, and has been throughout recognized, and indeed asserted by Parliament.

As this essential and fundamental object must from its nature be as paramount to all others, it was always recognised (*a*), from the times when liberty was first dawning, to those when it became most firmly established, that the necessity for maintaining it worked an implied exception to all the safeguards which law established for the protection of liberty. For it was obvious that neither law nor liberty could be enjoyed without peace and security, and,

(*a*) The great article of Magna Charta (c. 29), which is regarded as the basis of our liberties, ran thus, in its grand emphatic simplicity of language: "Nullus liber homo capiatur vel imprisonetur, aut utlagatur, aut exuletur; aut aliquo modo destruatur; nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terræ. Nulli vendemus nulli negabimus, aut differemus jus ticium, vel rectum." This, however, obviously implied that justice *could* have its course; and Lord Coke, in commenting upon it, after stating its effect and substance thus, "that no man shall be in any sort destroyed or condemned but by the judgment of his equals or the law of the land," proceeds to say that "there are cases in which a man may be seized without regular course of law. "Against those that attempt to subvert the king's laws, there lieth a writ to the sheriff in the nature of a commission, ad capiendam impugnatores Regis, &c., and this is lex terræ, and the reason is, merito beneficium leges amittit, qui legem ipsam subvertere intendit." This, however, still implies that he can be arrested, and that the law can then have its course; and on the principles here laid down, if the law could not have its course, by reason of rebellion, then those in rebellion could not claim the benefit of it. And he cites the case of Thomas of Lancaster thus:—"Thomas of Lancaster was adjudged to die as a traitor, and put to death in 14 Edw. II., and his brother and heir was restored, for two errors in the proceedings. "Quod non fuit araniatus et an responsionem positus tempore pacis, eo quod curiæ Regis fuerunt apertæ in quibus lex fiebat unicuique prout fieri consuevit. 2. Quod contra cartam de libertatibus, tempore pacis, absque araniamento sen responsione sen legali judicio," he was put to death. Which plainly implies that it was the summary execution of the man in time of peace, when the law could have had its course, which was the ground of the reversal of the judgment, and so it is evidently put by Lord Coke (2 Inst. 49). And elsewhere, commenting on the same case, he says, "Thomas of Lancaster being taken in open insurrection was by *judgment of martial law* put to death, and this was adjudged to be unlawful, eo quod, &c., reciting the grounds of error as before. And then he there says, "If a lieutenant or other that hath commission of martial law, *in time of peace*, hang or

therefore, when the Great Charter laid the foundation of our liberties, it was well understood that the strongest stipulations that justice shall have its regular course, only applied when justice *could* have its regular course, and that when it could not, those who thus prevented it could not claim the benefit of it.

In cases of rebellion, when it had proved formidable and widespread, it was always usual, in times when the military force was feeble, to execute summary justice upon the insurgents, for a short period after the suppression of actual insurrection, in order to extinguish the seeds of rebellion, and by the influence of terror to prevent its recurrence (*a*).

otherwise execute any man by colour of martial law, this is murder; for it is contrary to Magna Charta (3 Inst. 52). So Lord Hale, laying down that martial law is not permitted in time of peace, says, "And *accordingly*, was that famous case of Edmond Earl of Kent, who being taken at Pomfret, 15 Edw. II., the king had proceeded to give sentence of death against him, as in a kind of military court by a summary proceeding, which judgment was afterwards reversed in Parliament. And the *reason of that reversal* being to the purpose in hand, it is inserted as entered on the record—quod 'tempus in quo morte adjudicatur fuit, fuit tempus pacis, &c.' And accordingly that judgment was reversed; for martial law, which is rather indulged than allowed, and that only in case of necessity, in time of open war, is not permitted in time of *peace*." So Blackstone, in his commentaries, cited the case as showing that martial law, in the arbitrary sense, is not permitted in time of *peace* (1 Commentaries, ed. 1800, p. 413). Cockburn, C. J., in his charge in Nelson's case, citing the case, omits the words on which the judgment turned, in tempore pacis, and does not mention that all the commentators upon it put it as a case of martial law, and merely says that he is not satisfied that it was so, and that it seems to have been an irregular execution. But an irregular execution of a civilian in rebellion, by officers of the Crown, is the very definition of martial law; and it is to to be observed that the distinction as to soldiers was not known in that early age, and that it never occurred to any one that the ground of the decision was that the man executed *was not a soldier*. Beyond all doubt he was a civilian. The Lord Chief Justice, in his charge, says this was meant of soldiers; forgetting that in those times there were no soldiers in time of peace, in the sense of a separate class; that military service was always out of the country, and homicide abroad was not murder by the common law (1 Inst. 102).

(*a*) Thus, in the reign of Rich. II., in the Wat Tyler rebellion, many of the rebels were executed without due process or form of law (*Hume's Hist.*

And although when this power was exercised with excess there may have been a necessity for an indemnity, at all events to protect parties who had acted in good faith from being harassed and vexed by criminal prosecutions, no instance will be found in our history, either of a prosecution or an indemnity, for acts done, under the authority of the Crown, in the execution of martial law, for the suppression of rebellion.

From this fundamental principle it follows that as the object is paramount to all others, it is the peculiar prerogative of the Crown to levy war within the realm. As, on the other hand, it may be necessary for the Crown to levy

Eng., vol. 3, 10). This is the proper definition of martial law, that is, executions under the authority of the Crown without due course of law. Hume cites the 5 Rich. II, c. 5, which has been supposed to be a Bill of Indemnity, the only instance of the kind to be found in our history; but the indemnity was not merely for executions without due course of law, but for unbridled excesses, exercised under the direct orders of the Chief Justice, who was the executor of martial law on the occasion, and who examined no witnesses, but condemned men wholesale, without inquiry; insomuch that contemporary writers state, that whoever was accused before him, whether guilty or innocent, was sure to be condemned (*Barrington on the Statutes*, 262; *Lingard*, iv. 182; *Rapin*, iv. 25). Therefore a charter of pardon was granted, and this is the only instance of the kind to be found in our history, although martial law was executed after every rebellion or insurrection, as, for example, after the Jack Cade insurrection in the reign of Henry VI., some of the leaders were executed immediately afterwards, without any legal process (*Lingard*, vol. iv., 50). But some months afterwards, when further justice was executed, it appears, from a passage in the *Paston Letters*, that it was by what we should now call a special commission, for there is a letter (xxxvi.) from the Earl of Oxford to the Sheriff of Norfolk, dated in the winter of the year, in which he states that during the session of Parliament he was sitting at Norwich on a commission of oyer and terminer, with Yelverton, one of the king's judges, and that the king, by the advice of his great council, in consequence of the indisposition and insurrection of the Commons during the last summer, had sent the commission. It is to be observed that the insurrection extended into several counties, although it seems to have broken out in Kent, and its chief outrages were in London and at Leicester; and it is probable that those of the insurgents executed summarily were those taken speedily or immediately afterwards, and upon or near the scene of actual insurrection, so that their cases were clear; whereas the cases dealt with at

war against rebellious subjects, in order to preserve the peace, so, on the other hand, for subjects to levy war at all even for a lawful object, is an offence, but to levy war against the Crown is the highest of all offences, because it strikes at the root of that peace which is the basis of all law and liberty, and an insurrection or rebellion for the destruction of the powers of Government, or the institutions of the realm, may amount to such levying of war against the Crown, which will justify a levying of war by the Crown to put down the rebellion (*a*).

So well established is this, that the greatest authorities of our common law (*b*) are very full and explicit in defining

some distance, and after some lapse of time, and which therefore would require greater care, were dealt with by trial, under special commission, in the ordinary way. This illustrates the distinction between the proper scope of martial law, in the suppression of rebellion and ordinary civil jurisdiction, which, when it can be exercised, and it will be sufficient for the object, ought to be resorted to.

(*a*) It was high treason by the common law to levy war against the Crown, for no subject can levy war within the realm without authority from the king, for to him alone it belongeth. Le Roy de droit doit saveret defender son realm vers enemies, &c. (3 Inst. 9). "If any levy war to expel strangers, to deliver men out of prisons, to remove counsellors, or against any statute, or to any other end, pretending reformation without warrant—this is leving war against the Crown, for they take upon them royal authority, which is against the sovereign. There is a diversity between levying of war and committing of a great riot or an unlawful assembly. For example, if three or four or more do rise to burn or put down an enclosure in a particular place, this is a riot; but if they had risen of purpose to alter laws, or to *go from town to town generally*, and to cast down enclosures, this is levying of war, though there be no great number of conspirators, because the pretence is public and general, and not private in particular. And so it was resolved in the case of Bradshaw and others in Oxfordshire, whose case was that they conspired to assemble themselves, with as many as they could procure, and then to go *from gentleman's house to gentleman's house* and cut down enclosures; and this was held an intention to levy war against the Queen (*ibid* 10). And so under the statute of treasons, an actual rebellion or insurrection is a levying of war; and if any, with strength and weapons invasive and defensive, do hold a castle or fort against the king and his forces, this is a levying of war against the king (*ibid*). Lord Hale lays the law down to the same effect.

(*b*) Thus Lord Hale says, "What shall be said a levying of war is in

and describing what may and may not be deemed to amount to a levying of war against the Crown by subjects in rebellion, when formidable, either by reason of arms or of numbers. And although their definitions are rather more rigid than would be approved of by constitutional lawyers in our own days, yet, on the other hand, no constitutional writer has ever doubted that in spirit and in substance the doctrine was sound.

And though, no doubt, a mere riot is not a levying of war against the Crown, and there must be something which amounts to a rebellion, that is to say, a gathering together of men, with force and arms, with intent, by means of force

truth a question of fact, and requires many circumstances to give it that denomination, which may be difficult to enumerate or define, and commonly it is formed by the words more guerrino arrati, arrayed after the manner or war. As where people are assembled in great numbers armed with weapons of peace or weapons of war; if they march thus armed in a body; if they have chosen commanders or officers; if they march cum vexillis explicatis (with banners displayed), or with drums or trumpets, or the like; whether the greatness of their number, or their continuance together during those acts may not amount to an army after the manner of war, may be considerable." Lord Hale cites from Anderson's reports the following very illustrative case. "Divers apprentices of London were committed to prison for riot and for seditious proclamations as to the price of victuals, &c., for which divers others conspired to take them out of prison, to kill the mayor and burn his house, to break open the houses where arms were to be found, and thence to furnish themselves with weapons and arms for three hundred more: after which, divers of them devised seditious libels, moving others to take part with them in their movements and to assemble themselves, and accordingly divers assembled themselves and had a trumpet, &c., and in going towards the mayor's house they offered violence to those who resisted them, but slew no one. It was held that this was a levying of war, and an act of high treason, for which several of them were convicted and executed; and it was said by the judges that if any do intend to levy war for anything that the Queen by her justice ought or may do in government as Queen, that shall be declared a levying of war against her, and it is not material that they intended no ill to the person of the Queen, if intended against the office and authority." The result was, of course, that if the rebellion had been formidable enough to require it, martial law might have been declared. Thus, also, in another case cited by Hale, of the weavers in and about London, who assembled in several places within the metropolitan counties, to the number of several hundreds,

really necessary for the suppression of a rebellion, without protest or remark (*a*) ; and they record it as something perfectly well recognised, and understood and assented to, and as not requiring definition or description, otherwise than as the execution of such summary justice ; although these historians protest against it when exercised in time of peace, to the prejudice of civil jurisdiction, and in usurpation upon the common law.

and stopped, so as the courts of justice be *as it were* shut up, et silent leges inter arma, then it is said to be time of warre. And the triall hereof is by the records and judges of the court of justice, for by them it will appeare whether justice had her equall course of proceedings at that time or no, and this shall not be tried by jury." And then Lord Hale, in treating of martial law, which is the law of war, and which he says, "in truth and reality, is not a law, but something indulged rather than allowed as a law," says that it was "only to extend to members of the army, or *to those of the opposite army*; and the exercise of martial law, whereby any person should lose his life or liberty, may not be permitted in time of peace, when the King's courts are open for all persons to receive justice according to the laws of the land. For martial law, which is rather indulged than allowed, and that only in case of necessity, in time of open war, is not permitted in time of peace, when the ordinary courts of justice are open" (*ibid*). Whence it appears plainly to follow that when war is levied against the Crown, martial law is applicable to those who are engaged in rebellion.

(*a*) Thus, Lord Bacon, who was both a lawyer and historian, records what Henry VII. did after a rebellion: "Therefore, awakened by so fresh and unexpected dangers, he entered into due consideration, as well how to weed out the partakers of the former rebellion, as to kill the seeds of them in time to come; and withal to take away all shelters and harbour for discontented persons, where they might hatch and foster rebellion, which afterwards might gather strength and motion. And first he did yet again make a progress from Lincoln to the Northern parts, though it were indeed rather an itinerary circuit of justice than progress. For all along, as he went, with much severity and strict inquisition, partly by martial law, and partly by commission, were punished, the adherents and aiders of the late rebels ; not all by deaths (for the field had drawn much blood), but by fines and ransoms which spared life and raised treasure" (*Bacon's Life of Henry VII.* 23). Here it is to be observed, that Bacon speaks of martial law as opposed to the course of common law, and also as different from trial by commission ; and also as applying to all rebels, whether soldiers or not. And that it plainly was not meant in the sense of ordinary military law, which applies only to the king's soldiers, but in the sense of summary justice on civilians. The Lord Chief Justice says this was ob-

It is to be observed, however, that in mere cases of isolated acts of treason (*a*), or even of actual insurrection, when over, or even of more formidable rebellion, when thoroughly extinguished, it has never been deemed lawful to execute summary justice by martial law, upon the persons implicated; for that would be an encroachment on civil jurisdiction, and an interference, without just excuse, with the course of common law, which ought always to be allowed to have its free course when it can have it. And a broad distinction was always drawn between the exercise

viously illegal, which is not suggested by Lord Bacon, but if it was so, it was because the rebellion was over. It is to be observed that Lord Bacon uses the term martial law in a certain sense; and further, it must be observed, that Lord Bacon does not mention it as anything necessarily illegal; but, on the contrary, by his silence, rather implies his idea of its legality; and, at all events, mentions it as something quite well understood. Whether it was illegal, would depend upon whether it was really necessary to suppress the rebellion, which might be still smouldering, though subdued. So Hume mentions martial law again and again, as applied to civilians taken in rebellion. Thus, in the reign of Henry VII., "Norfolk spread the royal banner, and wherever he thought proper executed martial law, in the punishment of offenders" (vol. iv. 154). So under Edward VI., "Arundel and the other leaders were sent to London, tried, and executed; many of the inferior sort were put to death by martial law" (vol. iv. 294). Now the point to be observed is, that these and all other writers mention martial law as a thing well known and understood in the sense of summary justice, in time of rebellion, on those implicated, in the rebellion and as applied to civilians, and as opposed to trial by due course of law; and, further, that it never occurs to them to suppose it was illegal, when really necessary for suppression of a rebellion.

(*a*) The distinction here pointed out is well illustrated by the difference in the language of our historians and lawyers, when speaking of martial law proper; *i.e.*, the execution of summary justice in time of rebellion, and its illegal exercise in time of peace, as one of the institutions of the realm. Not a word will be found in Lord Coke or Lord Hale against the execution of this summary justice in time of rebellion, though they zealously denounce any instance of arbitrary authority they meet with in our history; witness Coke's denunciation of the commissions of Empson and Dudley, under Hen. VIII., or of the arbitrary commission to the Count of Rivers, Constable of England, under Edw. IV.; which will be found in *Rymer*, vol. xi. p. 581, and is a kind of permanent commission of martial law, or summary justice in all cases of treason or rebellion. Hume gives an illustration of this arbitrary jurisdiction: "John, Earl of Oxford, and his

of such summary justice on occasions of sudden emergency and in seasons of imminent public peril; and its exercise in time of peace, when the common law would have its course. The former was allowed as an indulgence, on account of the necessity, the latter was always denounced as an usurpation.

So strongly rooted and well established in the constitution is the prerogative of the Crown, to levy war, if necessary, for the preservation of the peace, or the protection of the realm, either from domestic insurrection or foreign invasion, that, from the most ancient times, it was recognised to be part of its prerogative to keep in readiness a militia (*a*), or domestic military force, to be called

son were detected in corresponding with Margaret, were tried by martial law before the Constable; were condemned and executed. Sir W. Tyrrell and others were convicted in the same arbitrary court and were executed" (vol. iii. p. 260). Upon which his comment is, "This introduction of martial law into civil government, was a high strain of prerogative" (*Ibid*). And in his note, H, he puts the illegality, as Coke had put it, upon its being in time of peace. "The office of constable was perpetual; its jurisdiction was not limited in time of war," and then he goes on to say quite truly, "Its authority was in direct contradiction to Magna Charta, and it is evident that no regular liberty could subsist with it. Accordingly the office was suppressed by Henry VIII.; the practice, however, of exercising martial law still subsisted, and was not abolished till the Petition of Right." That is, the practise of exercising it as here described, in time of peace and for the purposes of civil government. The historian has not a word to say, here or elsewhere, against the execution of martial law in time of rebellion, although he records it over and over again. When it appears to have been exercised in time of peace, his indignation is aroused, and he protests against it. This shows that he perfectly understood what he meant by martial law, and meant it in the sense in which it is here understood; and that he was not at all indifferent to its exercise.

(*a*) "We are not to imagine, says the great commentator, that the kingdom was left without defence, in case of domestic insurrection, or the prospect of foreign invasion. It was usual for our princes to issue from time to time commissions of array, and send into every county officers in whom they could confide, to muster or set in military order the inhabitants of every district. But it was provided that no man should be compelled to go out of his shire, but in cases of urgent necessity" (*Blackstone's Commentaries*, vol. i. c. 8, *of the Royal Forces*). This implied, of course, that in case of necessity, the king's officers could lead them out of one county

out when necessary, for the very purpose of levying war for either of those objects. And the command of this, which may be called the common law army of the realm, as distinguished from a regular soldiery or standing army, which is by statute, was vested in the Crown by prerogative, and has been recognised by Parliament as so vested, for the express purpose, as numerous statutes attest, of enabling the Crown to exercise its prerogative of levying war, if necessary, to preserve the peace.

As, upon these principles, it would be lawful by the common law, upon the occurrence of rebellion, to declare war, or in other words, martial law, if necessary for its suppression; and as, also, it would be lawful, and indeed unavoidable, for the Crown to delegate to lieutenants, by- virtue of its prerogative, the power to exercise the rights of war, and execute the laws of war for that purpose;

into another, either in case of rebellion or invasion; and in case of rebellion, to attack the rebels. "About the reign of Henry VIII., the commentator continues, lieutenants of counties began to be introduced, as standing representatives of the Crown to keep the counties in military order; and Camden speaks of them as extraordinary magistrates, constituted only in times of difficulty and danger. The introduction of these commissions of lieutenancy, which contained in substance the same powers as the old commissions of array, caused the latter to fall into disuse." He goes on to state that this prerogative was disputed at the time of the rebellion, and it became a question how far the power of the militia did belong to the Crown. The statute 13 Ch. II., s. 6, affirmed, however, that the supreme command of all the militia of the realm was the undoubted right of the Crown; and so it has ever since remained, and has been established by numerous statutes. The 26 Geo. III., c. 107, provided that militia might be embodied; and s. 95, enacted, "That in all cases of rebellion or insurrection it shall be lawful for His Majesty (the occasion being first communicated to Parliament, if the Parliament shall then be sitting, or declared in council and notified by proclamation if no Parliament then be sitting) to order and direct the lieutenants of the militia to draw out and embody the militia within their respective counties, and in such manner as shall be best adapted to the circumstances of the danger, to put the said forces under the command of such general officers as His Majesty shall approve of, to direct the said forces to be led by their respective officers into any parts of the kingdom for the suppression of any rebellion or insurrection within the realm." It is added that the militia, when called out, shall be under the Mutiny Act.

so it would not, perhaps, be necessarily unlawful for the Crown, in its commissions of lieutenancy (*a*), whether in this country or in any colony or dependency, providing for the exercise of this right, when, by reason of such rebellion, the occasion for it should arise. And accordingly such commissions were issued, and have never been declared illegal or unconstitutional.

It never was legal, however, to exercise martial law, or the law of war, against the subject in time of peace, or

(*a*) And accordingly, before the age of standing armies, it was usual for the Crown to issue commissions of lieutenancy containing clauses which empowered, in case of rebellion, the exercise of martial law. Here, for instance, is an example taken from *Rymer's Foedera*, com. vii., pt. iii., p. 32, and issued in 1617, ten years before the Petition of Right. It was thus:—"We give full power and authority unto you (the Lord President of the Council in Wales) to levy men of armes of all kindes and degrees meet and apte for the warres, and them to lead and conduct as well against all and singuler our enemies as also against all and singuler rebells, traytors, and other offendors and theire adherents against us, our Crowne and dignitie, within the saide principalitie and dominions . . . and with the saide enemies, traytors, and rebells from tyme to tyme to fight, and them to invade, resist, suppresse, subdue, slea, kill, and put to execution of death by all waies and means from tyme to tyme by your discretion . . . . and further to doe, execute, and use, against the said enemies, traytors, and rebells, and such other like offendors and their adherentes, aforementioned from tyme to tyme, as necessitie shall require, by your discretion, the lawe called the martiall lawe, according to the law martiall; and of such offendors apprehended or being brought in subjection, to save whom you shall thinck good to be saved, and to slea, destroie, and put to execution of death such and as many of them as you shall thinck meete by your good discretion to be put to death." Now, as already observed, this was issued ten years before the Petition of Right, and the terms of that Act are carefully framed so as not to apply to such commissions as this, which it will be noticed is strictly limited to rebellion, and the offence of rebellion; whereas the commissions referred to in that Act, as will be seen, embrace larceny and all ordinary offences. And this was a usual and common commission. The counsel for the prosecution in the Jamaica case admitted that "in *Rymer* would be found proclamations of martial law in which things were authorised exactly such as were done in Jamaica." And it may be added that the terms of the proclamation in Jamaica were in substance the same as the above—a strong proof of the truth and reliability of the legal doctrines and military traditions on which it was based. Cockburn, C. J., in his charge in Nelson's case, has nothing to

against ordinary offenders, for ordinary offences (*a*); and although at certain periods of our history it was found convenient to issue commissions of martial law, for the punishment of such offenders, and the repression of such mere riots or disturbances as could be repressed by the ordinary means and powers of law, there never was any doubt that such commissions were wholly illegal. And the distinction between such commissions and the exercise of martial law, for the suppression of rebellion, was always well understood in our history.

observe upon the above, except that it did not appear to have been executed; the reason of which is very obvious, viz., that it was not required, because there was no rebellion. But the point is, that it was a usual and common commission, that it is inserted in *Rymer* as a precedent or form, that it was evidently regarded as usual and legal, and that when the Petition of Right came to be drawn it was carefully so drawn as not to apply to such commissions as these, issued for suppression of rebellion. Of course, similar commissions would not necessarily be unlawful in colonies or dependencies. But see further as to this delicate question.

(*a*) The distinction between the proper use and scope of martial law in the suppression of rebellion, and its abuse for purposes of mere punishment or a suppression of ordinary disturbances, was well understood and recognised, even in the age when it was most disregarded. Thus Hume says, "Whenever there was any insurrection or public disorder, the Crown employed martial law, and it was during that time exercised not only over the soldiers, but over the whole people. Any one might be punished as an aider or abettor of a rebellion;" and as an example he quotes Lord Bacon as saying, "that the case of the Earl of Essex and his fellow-conspirators would have borne the severity of martial law. But the kings of England did not always limit the exercise of this law to times of civil war and disorder. Thus, in 1552, when there was no rebellion or insurrection, Edward VI. granted a commission of martial law. Queen Elizabeth was not sparing in the use of this power, and in the case of an isolated outrage by an individual, the Queen was so incensed that she ordered him to be punished instantly by martial law; but upon the remonstrances of some prudent counsellor, who told her that this law was usually confined to turbulent times, she delivered him over to the common law (vol. v., appendix iii.). This commission was granted to Sir Thomas Wilford, granting him authority, upon signification from justices of the peace, of idle vagabonds or riotous persons worthy to be speedily executed by martial law, to execute them (*ibid*, 456). It is obvious that these and many similar commissions which might be cited had really no colour of legality; they were not issued in time of nor in the event of war, but in

Indeed, as martial law, or the law of war, can only be justified by a war, or by the occurrence of a rebellion creating a pressing and paramount necessity, and necessity can only be judged of when it arises—it is questionable whether commissions of martial law, providing for its future exercise, on some uncertain occasion, would be legal, unless the issuing of them could be excused, by such circumstances of distance and difficulty of communication, as existed in this country in former times, but which are not likely to occur in our own times, except in cases of colonies or distant dependencies of the Crown. But, beyond all doubt, commissions of martial law, for the trial, not only of rebels, but of all ordinary offenders, were always illegal, and were so declared by the Petition of Right (*a*).

time of peace, and to be executed in time of peace, and on ordinary offenders, superseding, without any excuse or pretence of necessity, the ordinary law. Such cases have been cited as instances of martial law, but in truth they were not martial law; they were simply assumptions of despotic authority wholly contrary to law. And the distinction will be observed between these commissions and real commissions or proclamations of martial law, such as have been already cited. The truth is, that there is something irregular in the very term commission of martial law, for martial law being but the law of war, it is rather by declaration or proclamation, as upon a declaration of war, or on some sudden necessity and emergency, than by commission, which appears to contemplate something permanent, continued, or settled. And if commissions of martial law were legal at all, it could only be as directed to the occurrence of a future rebellion, amounting to a formidable war. As, however, the necessity could only be judged of when it arose, such commissions were of very doubtful legality, even when confined to rebellion. So when the streets of London were much infested with riotous persons, the Queen finding other remedies inefficient, decreed martial law, and gave Sir Thomas Wilford a commission of provost marshal, as above stated (*ibid*). This commission recited that "sundry great unlawful assemblies of a number of base people in riotous sort, for the suppression of which it was found necessary (for that the insolency of many desperate offenders is such, that they care not for any ordinary punishment by imprisonment) to have some notable rebellious persons to be speedily suppressed by execution to death, *according to the justice of martial law*." This was obviously illegal, for it was applying martial law to mere rioting.

(*a*) The particular commissions which led to the declaration in the Petition of Right, and which are recited in it, were such as that issued

The exercise of the prerogative of the Crown to levy war against subjects can only be justified on the ground of

Dec. 1625, to Lord Wimbleton, which empowered him to proceed against soldiers or *dissolute persons* who should commit any *robberies*, &c., which by martial law ought to be punished with death, by such summary course as is agreeable to martial law, &c. (*Rymer*, xviii., 254). Another similar commission, dated 1626, will be found, p. 751 and p. 763. Now, these commissions correspond so exactly with the terms of the recital in the Petition of Right, that it is manifest they were the commissions alluded to; and it will be seen how entirely they differed from martial law proper, which, to begin with, was not proper by commission but by declaration or proclamation on the sudden breaking out of war or rebellion, as on the occasion of a great public emergency. The Petition of Right recited that by the Great Charter and other laws of the realm, no man ought to be judged to death but by the laws established in the realm, either by the customs of the realm or Acts of Parliament, and, "Whereas no offender, of what kind soever, is exempted from the proceedings to be used, and punishments to be inflicted by the laws and statutes of this your realm, nevertheless of late time divers commissions under your Majesty's great seal have issued forth, by which certain persons have been assigned and appointed commissioners, with power and authority to proceed within the land according to the justice of martial law against such soldiers or mariners, or other dissolute persons joining with them, as should commit *any murder, robbery, felony, mutiny, or other outrage or misdemeanour whatsoever*, and by such summary course and order as is agreeable to martial law, and as is used in armies in time of war, to proceed to the trial and condemnation of such offenders, and them to cause to be executed and put to death according to the law martial (viii.), by pretext whereof some of your Majesty's subjects have been by some of the said commissioners put to death, when and where, if by the laws and statutes of the land they had deserved death, by the same laws and statutes also they might, and by no other ought, to have been judged and executed," therefore it is prayed, "that the aforesaid commissions for proceeding by martial law may be revoked and annulled, and that hereafter no *commissions of like nature may issue forth*," &c. It will be observed that this is carefully restricted to commissions for the trial of all offences by all kinds of offenders, and says not a word as to *martial law for suppression of rebellion*. In the age in which the Petition Right was passed no one supposed that it rendered martial law illegal for the suppression of rebellion. Upon that subject there is a contemporary authority of infinitely greater relevance and importance as to the lawfulness of martial law, the authority of one who suffered severely for liberty. Allusion is here made to the passage quoted by Mr. Bristow from Prynne. It is from his *Animadversions on, Amendments of, and Additional Explanatory Records to the Fourth Part of Coke's Institutions of the Law of England*; published in 1669, p. 60.

a paramount necessity, for the preservation of the peace or protection of the realm, for the welfare and protection of

Prynne quotes a pardon granted by Queen Elizabeth (Pat. de Anno 12 E. c. m. 30 intus. De Pardonacione pro majore et civibus Dublin.) granted to the mayor and citizens of Dublin, for having, in view of a threatened invasion of Scottish enemies *and rebels*, destroyed houses and buildings in the suburbs of the city, for facilitating its defence. Upon this Prynne remarks, "Had the mayor and citizens been military officers, commissioned by the king to garrison and guard the city against the enemies, *their cases had been stronger in point of martial law and warlike discipline, needing no pardon in such a case as this.*" It is true the case related only to seizure of property, but, as every lawyer knows, the test of legality is the same whether applied to property or person, and the doctrine laid down by Prynne obviously is that martial law justifies whatever is necessary, as against rebels, or for suppression of rebellion. So Hale, not long after the Petition of Right, described it as making martial law illegal *in time of peace* (*Hist. Com. Law*). So far, however, from the Petition of Right being deemed to have abolished martial law, there is an unbroken tradition of legal authority from that time to the present, that it is lawful in rebellion, and is absolute military authority. Thus, just before and just after the Petition of Right, it was thus defined, in a passage cited in every law dictionary from that time to this: "Martial law is the law that depends upon the just and arbitrary power of the king, or his lieutenant, *in time of war.* For in war, by reason of the great danger arising from small occasions, he useth absolute power" (*Smith, Rep. Ang.*, lib. ii., c. 3, cited in *Blount's Law Dictionary*; and in *Cowell*, edition 1670; and in *Jacobs*, and in *Tomlin*, edition 1835). So, "Martial law is an arbitrary law, originating in emergencies, regulated by the expediency of the moment, and extending to all the inhabitants of a place or country" (*Dr. Worcester's Dictionary*, title "Martial"). The Author has seen with some surprise loose statements that the Petition of Right abolished martial law. It appears to him that there is an error; and that this is manifest, either from its terms or its history, or the construction put upon it by its author. It will be observed that there is no distinction or exception as to soldiers; so that whatever it declared illegal was equally illegal as to soldiers as to other classes of persons. Yet after the Petition, as before, soldiers were executed by martial law for mutiny, and although it was objected to, the objections were overruled, and eminent lawyers advised that, in time of war, in the face of the enemy, it was legal (*Rushworth*, vol. iii., 1199). And so under the Commonwealth, an ordinance passed, establishing a commission to hear and determine matters of military cognisance according to articles of war, and try, convict, and execute all offenders against them (*Parl. Hist.*, vol xiii., p. 270). And among the articles were these:—No soldier or officer shall make any mutinous assembly, or be assisting thereunto, on pain of death. And there was a regulation that men should

which alone prerogative exists. When war is thus lawfully levied by the Crown for the suppression of rebellion, or resistance of invasion, that same prerogative, grounded on the necessity at common law, empowered the Crown to govern the army absolutely, or by a law different from that of the common law (*a*), and this law of war, as being only

repair to their regiments under pain of death (*Parl. Hist.*, vol. xiii., p. 299). Many trials by court-martial took place under this ordinance by martial law, and several persons were sentenced to death, not soldiers merely, but a civilian who was convicted as a spy (*Whitlock's Mem.*, p. 110). And after this ordinance had expired, Cromwell put mutinous soldiers to death by a drum-head court-martial (*Tytler's Military Hist.*, p. 94).

(*a*) Thus martial law became an ambiguous phrase, as it embraced military law, or rules for the government of the army, as well as the law of war; and the whole was called martial, because there was no army but in time of war. The military law was administered in the court of the constable-marshal, which was the curiæ militaris; and it is called by Lord Coke the marshal court and the fountain of the marshal law, which has been curiously supposed to mean martial law, whereas afterwards he uses *that* phrase, to describe martial law proper, as the law of war; alluding to the Petition of Right, in which it is defined as the justice of martial law such as is used in armies in time of war, *i. e.* the criminal justice of the army, as quite distinct from its civil rules (*Lord Coke's Institutes*, v. 4, c. 17, p. 123). The court of the marshal had a regular civil jurisdiction over military matters, extending to contracts; for the military law, so long as it applied, embraced all the offences and affairs of soldiers, military or otherwise. Thus Lord Hale treats of it: "In matters of war the constable and marshal had a double power. 1. Ministerial, as they were two great ordinary officers. 2. They had also a judicial power, as a court wherein several matters were determined, as, the rights of prisoners taken in war, the offences and miscarriages of soldiers, contrary to the laws and rules of the army. For, always preparatory to an actual war, the kings of the realm were used to compose a book of rules and orders for the due discipline and order of their soldiers, together with certain penalties on the offenders, and this was called martial law. But, touching the business of martial law, these things are to be observed, viz.:—Firstly, that in truth and reality it *is not a law*, but something indulged, rather than allowed, as a law. The necessity of government, order, and discipline in an army, is that only which can give those laws a countenance; quod enim necessitas cogit et defendit. Secondly, this indulged law was only to extend to members of the army, *or to those of the opposite army*, and never was so much indulged as intended to be executed or exercised upon others. For others who had not listed under the army, had no colour or reason to be

legal or allowable in war, was called martial law; which originally included military law, that is, rules for the regular government of the discipline of the army, as a military body while the war subsisted, and which embraced all matters which from their nature could be made subject of rule and regulation, and applied to all offences of soldiers, whether military or ordinary.

When, however, the army became allowed and established by statute, in time of peace, as a permanent body, so much of military law as the legislature thought proper to sanction—that is to say, so much of it as related to its discipline—was enacted or allowed under the authority of statute, in the Mutiny Act and Articles of War (*a*); and

bound by military constitutions applicable only to the army, whereof they were not parts. But they were to be ordered and governed according to the laws to which they were subject, though it were a time of war. Thirdly, that the exercise of martial law, whereby any person should lose his life or member, or liberty, *may not be permitted in time of peace*, when the king's courts are open for all persons to receive justice according to the laws of the land. This is in substance declared by the Petition of Right (3 Car. I.), whereby *such* commissions and martial law were repealed, and declared to be contrary to law" (p. 42, Ed. 1820). That is, commissions of martial law in time of peace. Now here it is obvious that Lord Hale uses the term martial law in a double sense, as containing the law of war, properly so called, in which sense it is no law, and the military law, which originally was only allowed in time of war, and, of course, only could be applicable to soldiers, for it is, as he describes it, a matter of regulations and constitutions, which are not issued to enemies, and he had distinctly stated already that martial law (proper), *i.e.*, "no law at all," applied to the opposite army—that is, in time of rebellion, the rebel army.

(*a*) The Mutiny Act was only rendered necessary with reference to a standing army in time of peace, and it is founded on the Bill of Right (1 Will. III. s. 2, c. 1); reciting that, the keeping or raising a standing army within the kingdom in time of peace without the consent of Parliament is illegal. The Mutiny Act, since 1689, has recited that no man can be forejudged of life or limb, or subjected in *time of peace* within the realm to any kind of punishment by martial law, or in any other manner than according to the known laws of the realm; and then it gives power to make articles of war for the government of *the army*, and provides that no person *within the United Kingdom* shall, by such articles, be subject to any punishment extending to life and limb except for crimes by the Act made punishable. And it proceeded to enact that all the provisions of the Act

these then formed the only military law in the country, and martial law, in its looser ambiguous sense, became obsolete, and remained only in its real and proper sense as the law of war, in which sense it did not admit of being confined within fixed rules and regulations, and in which sense it remained, as all military law originally was, absolute, and subject to the prerogative out of which it arose.

Military law, therefore, has ever since its establishment, by statutes and articles, been clearly distinguished from martial law in its proper sense, or the law of war; or in that looser sense in which it was once used (*a*), as including

shall apply to persons *enlisted or in pay as soldiers*, or all persons who shall be serving with any part of the army at home or abroad. But it was long ago settled that as by the Act the power to make articles of war is confined to his own dominions, when his army is out of his dominions, he acts by virtue of his prerogative, and without statute; and further, that flagrante belle, the common law has never interfered with the army (*Barwis* v. *Keppel*, 2 Wilson's Reports, 318). That was just before the great commentator wrote, and he wrote thus on the subject: "Martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Mathew Hale has observed, in truth and reality no law at all, but something indulged rather than allowed as law. The necessity of order and discipline in an army is the only thing which can give it countenance, and therefore it ought not to be permitted in time of peace, when the King's Courts are open for all persons to receive justice according to the laws of the land" (vol. 1, 413). This, it is manifest, was meant of martial law—no doubt as to soldiers—but martial law in its original sense of absolute law; for the great commentator cannot be supposed to have forgotten and he goes on to mention, that regular military law was established by statute in time of peace. Tytler, in his *Military Law*, actually supposes that Blackstone meant regular military law in the above passage, and makes an amusing attack upon him, in which view he has been followed by Cockburn, C. J., in his charge. But all approved military writers, ever since the time of Blackstone, have carefully distinguished between military law and martial law. Thus, for instance, in *MacArthur on Court-Martial.*

(*a*) This was fully explained in 1792, in a celebrated case (*Grant* v. *Gould*, 2 Henry Blackstone's Reports, 67), in a judgment of Lord Loughborough, which has been singularly misunderstood, through want of attention to the previous history of the subject. It was a case which arose *in time of peace*, so that there was no occasion to say a word about martial law in time of war, and anything said thereon would have been obiter, or extra-judicial. In argument, the counsel for the applicant had entered at length into

not only martial law but military law, that is all rules for the government of an army; including, as it then did, all their offences, ordinary or military, in which sense it has of course been exploded, and in the sense of military law it has been superseded. Military law is now well understood to mean regular military law, so far as it is allowed, and enacted by statute; but it has always been held that in time of war the Crown is not bound by these rules. And martial law has ever since been understood to mean, that law of war which, as to soldiers, is only allowed in

those abuses of martial law which prevailed in ancient times. This led Lord Loughborough to say, "that martial law, such as it is described by Hale, and such also as it is marked by Mr. Justice Blackstone, does not exist in England at all. Where martial law is established and prevails in any country, it is of a totally different nature from that which is inaccurately called martial law, merely because the decision is by a court-martial, but which bears no affinity to that which was formerly attempted to be exercised in this kingdom, which was contrary to the constitution, and which has been for a century totally exploded. Where martial law prevails, the authority under which it is exercised claims a jurisdiction over all military persons, *in all circumstances*. Even their debts are subject to enquiry by a military authority; *every species of offence* committed by any person who appertains to the army is tried, not by a civil judicature, but by the judicature of the regiment or corps to which he belongs. It extends also to a great variety of cases, not relating to the discipline of the army, in those states which subsist by military power. Plots against the Sovereign, intelligence to the enemy, and the like, are all considered as cases within the cognizance of military authority. In this country *all* the delinquencies of soldiers are not triable by martial law; but where they are ordinary offences against the civil peace, they are tried by the Common Law Courts. Therefore, it is totally inaccurate to state martial law as having any place within the realm." That is, martial law in that large sense, extending to all offences. For he goes on to say, that by the Mutiny Act, persons who compose the army are, for all offences in their *military capacity*, subject to trial by their officers. But the object of the trial is limited to *breaches of military duty* (*ibid*). This has been strangely misunderstood as alluding to martial law in its proper sense as peculiar to war. But war was not in the mind of the Court, nor martial law in that sense. He was speaking of military law in time of peace, and as applicable *to all ordinary offences*, as it used to be, in old times, under the name of martial law, simply because, as there were no soldiers but in the time of war, the name martial law, or the law of war, included the whole.

time of war, and which, not being restrained by rules and regulations, is absolute.

It is to be observed that the Petition of Right applied equally to soldiers, in common with all other citizens and subjects; and declared illegal, as to soldiers, as well as others, trial by court-martial, for ordinary offences. That this could not and did not apply to trial of soldiers by martial law for offences against military law, at all events in time of war, appears clear from the terms of the Petition, which defines martial law as "used by armies in time of war," and, without a word in reprobation of it, declares illegal trial by martial law, under such commissions as had been issued, for trial of all kinds of persons, for all kinds of offences in time of peace; and beyond all doubt soldiers continued to be tried and executed by martial law, for offences against military law. This could only have been upon the grounds of a paramount necessity, and there is nothing in the Petition of Right against martial law, on the same principle of necessity, in case of rebellion. Soldiers are not less citizens than others, and cannot be deprived of common law rights, except on the ground of necessity, and for the safety of the community. Military law as to soldiers will be found to rest entirely on this principle, and the same principle alone can govern its application to others.

Since the Revolution, military law, so far as it is capable of being reduced to rule or regulation, has been embodied in statute or statutable enactments. Martial law, in its original sense, meaning the law of war as applied to soldiers (*a*), it is evident that any secondary sense of it in

(*a*) The Mutiny Act recites that it is requisite that soldiers who shall mutiny or stir up sedition, or be guilty of crimes or offences to the *prejudice of good order* and military discipline, be brought to more exemplary and speedy punishment than the usual forms of law will allow; and then it enacts that the sovereign may make articles of war for the better government of the army, which shall be judicially taken notice of; and that no person *within the United Kingdom or the British Isles* shall by such articles

regard to civilians in rebellion, must depend upon its original sense as applied to soldiers; and it is therefore essential to understand what it is with regard to soldiers, in so far as it is embodied in the Mutiny Act or Articles of War; whether with reference to crimes and offences, or to penalties, or to the constitution of courts and mode of procedure. The purview and principle of that Act, as laid down in the preamble, and annually recited every year since the Revolution, is, that it is necessary in order to retain the army in its duty, that is, to preserve the peace of the realm, and protect the subjects from the mischief which must result from the power of the army if left unrestrained, that soldiers who are guilty of offences to the prejudice of good order and discipline, be brought to more exemplary and speedy punishment than the usual forms of law will allow, and with that view various offences are created, and

be subject to suffer any punishment extending to life or limb, or to be kept in penal servitude, except for crimes which are by the Act expressly made liable to such punishments; or shall be subject, with reference to any crimes made punishable by the Act, to be punished in any manner which shall not *accord* with the provisions of the Act (s. 1). And all soldiers serving in any of Her Majesty's dominions abroad, or in places in possession of Her Majesty's subjects, under the command of any officer having any commission immediately from Her Majesty, shall be subject to the Act, and the Articles of War (s. 4). Then as to offences, the Act provides that if any person subject to the Act shall begin, excite, cause, or join in any mutiny or sedition in any forces of Her Majesty, or shall not use his utmost endeavours to suppress it, or shall conspire with any other person to cause a mutiny, or, coming to the knowledge of any mutiny, or intended mutiny, shall not, without delay, give notice thereof to his commanding officer, or shall hold correspondence with, or give advice or intelligence to any *rebel or enemy* of Her Majesty, whether such offence be committed within the realm or in any other of Her Majesty's dominions, or in foreign parts, shall *suffer death* or such other punishment as by a court-martial shall be awarded. Then the Articles of War enact that any soldier who shall hold correspondence with, or give intelligence to the enemy (51), or who shall impede the provost-martial *or any other officer exercising authority, or refuse to arrest him when requiring his aid in the execution of his duty, or shall neglect to obey any order*, shall, on conviction thereof before a general, or district, or garrison court-martial, suffer such punishment as shall accord with the provisions of the Act, and the usages of the service.

penalties are inflicted, with much greater severity and by a much speedier procedure than at common law. And it will be found that these articles contain much that is applicable in respect to soldiers, or others, in cases of war or rebellion, so far as these matters can be made the subject of express regulation.

Under the Mutiny Act, the offences of soldiers against the Articles of War, are tried by courts-martial; and in countries beyond seas, courts-martial may take cognisance not only of offences against military discipline, in the sense of obedience to orders, or to officers, but also in the larger sense of preservation of good order; and may therefore take cognisance of offences against the persons or property of any of the inhabitants of the country, and may inflict even capital sentences on soldiers. And while, on the one hand, it is carefully provided that only general courts-martial, composed of a certain number of officers, shall have power to inflict capital sentences, it is also provided, on the other hand, that where it is impracticable to assemble a general court-martial, a court composed of three commissioned officers may sit. And, on the same principle, there is a provision for mixture of officers of both services, upon the same court-martial, when such mixture is convenient (*a*).

(*a*) It shall be lawful for any officer commanding any detachment serving in any place beyond seas, where it may be found impracticable to assemble a general court-martial, upon complaint made to him of any offence committed against the property or person of any inhabitant or resident in any country in which the troops are serving, by any person serving with or belonging to Her Majesty's armies, being under the immediate command of such officer, to convene a detachment general court-martial, which shall consist of not less than three commissioned officers, for the purpose of trying any such person; and every such court shall have the same power in regard to sentences, upon offenders, as are granted by the Act to general courts-martial; provided that no sentence of any *such* court shall be executed until the General commanding the army of which such detachments forms part shall have approved and confirmed the same (Mutiny Act, s. 12). And every general court martial (which is to consist of not less than thirteen officers) shall have power to sentence to death, &c.

And there is an important provision (*a*), the principle of which may have some bearing upon the present subject; namely, that any soldier in any place within the Queen's dominions beyond seas, where there is no civil judicature in force, may be tried before a court-martial for treason, or any other civil offences, which, if committed in England, would be triable by a court of ordinary criminal jurisdiction, and shall be liable to capital punishment, if the offence is capital in England; or otherwise to any sentence the court may award, so that it is not of such a nature contrary to the usages of English law.

(s. 8). Any court-martial may sentence any soldier to corporal punishment, or for insubordination accompanied with personal violence (s. 22). And by the Articles of War, a general court-martial may sentence to death (s. 115), but not without the concurrence of two-thirds of the officers (s. 116); and no court-martial other than a general court-martial, or a detachment general court-martial, having the same powers (*ut supra*) shall have power to pass sentence of death (s. 117). Any court-martial may sentence a soldier to corporal punishment for mutiny or for insubordination accompanied with personal violence; and save as aforesaid, no court-martial shall have power to sentence a soldier to corporal punishment except while in active service in the field, or for mutiny on the line of march, or any breach of the Articles of War; and no sentence shall exceed fifty lashes. And no sentence of corporal punishment awarded by a regimental court-martial shall, except in case of mutiny or insubordination, accompanied with personal violence, be put in execution *in time of peace*, without the leave of the General (s. 118). No sentence of a general court-martial shall be put in execution until after a report to the Governor or Commander-in-chief; and no sentence of death shall be carried into effect in any of our colonial possessions until it shall have been approved by the civil Governor (s. 23). A detachment general court-martial shall have the same power in regard to sentence upon offenders as a general court-martial, but no sentence of a detachment general court-martial shall be executed until the General in command shall have approved and confirmed (s. 124). Where it is necessary or expedient, a court-martial composed exclusively of officers of the army, or of officers of marines, or of officers of *both* services, whether the Commander belonged to our land or marine services, may try a person belonging to *either* of those services; and when the person to be tried shall belong to the army, the proceedings shall be regulated as if the court were composed only of officers of the army (s. 146).

(*a*) Any officer or soldier who may be serving in any place within our dominions beyond the seas (except in India, as to which there is a special Act), *where there is no civil judicature in force* under our authority compe-

Now, it will be observed, that the Mutiny Act and Articles of War, which embody as much of the law of war as can be put into fixed regulations and rules, but not the whole of it, do not confine the prerogative of the Crown in the government of the army, as to offences and penalties, except in the United Kingdom or the British Isles (*a*), and do not confine it in actual war, or in the foreign dominions of the Crown. And further, that, although they apply only to soldiers, yet as soldiers are not the less citizens and subjects, or entitled to rights as such, than any other class

tent to try such offender, and who shall be accused of treason, or of any other civil offence which, if committed in England, would be punishable by a court of ordinary criminal jurisdiction, and not by court-martial, shall be tried by a general court-martial appointed by the officer commanding in chief in such place, and if found guilty shall be liable, in the case of an offence which, if committed in England, would be capital, to suffer death; or, in the case of any other offence, to suffer such punishment other than death as by the sentence shall be awarded; no such punishment to be of such a nature as shall be contrary to the usages of English law; or to be carried into effect until such officer commanding in chief shall have confirmed it. Now, no doubt this applies only to soldiers, but it is a legislative declaration of what is reasonable as to soldiers; and in the case supposed, what is reasonable as to soldiers is, when the safety of the whole community is at stake, equally reasonable as to others; it being borne in mind that the principle upon which soldiers are liable to those pains and penalties, and this summary procedure, is not that they are not, as much as others, citizens and subjects, and entitled to the rights of citizens and subjects, but for the sake of the safety and welfare of the community at large; and the same principle would in a great emergency warrant by analogy the application of a similar course of proceeding to persons in armed rebellion, and thus, in the position of soldiers, and moreover of mutinous soldiers. No doubt the clause may have been drawn primarily with reference to the case of a foreign dependency, without any regular court of civil judicature; but here again the principle is the same whether there is no such court *actually* in existence or able to exercise its jurisdiction. And if the whole colony is in disorder and disturbance by reason of rebellion, and the court, even if it exists, is not able to exercise its jurisdiction, it may fairly be said that there "*is no civil judicature in force.*" And such is the sense put upon it in *Simmons on Courts-Martial.*

(*a*) It is only provided by the Mutiny Act that no person within the United Kingdom or the British Isles, shall by the articles be subject to suffer any punishment extending to loss of limb, except for crimes which are by the Act made liable to such punishment, or shall be subject with re-

of persons, they cannot be deprived of their rights by the prerogative, except by reason of great necessity, with reference to the protection and well-being of the whole community. And upon that principle alone, therefore, these stringent provisions, and that still more stringent prerogative, out of which they originally arose, can be vindicated.

The very existence of Mutiny Acts and Articles of War, grounded as they are upon the Bill of Rights and the Petition of Right, which applied equally to soldiers or any

ference to any crimes made punishable by the Act, to be punished in any manner which shall not accord with the provisions of the Act (s. 1). And at the end of the Articles of War it is declared, on wide and general terms, that all crimes not capital, and all acts, disorders, and neglects, which soldiers and other persons subject to the Articles may be guilty of, to the prejudice of good order and discipline, *though not specified* in the Articles, shall be taken cognizance of by courts-martial. It was laid down in the time of Blackstone that by the Mutiny Act and Articles of War, the King's power to make Articles of War is confined to his own dominions; when his army is out of his dominions he acts by virtue of his prerogative, and without the statute or Articles of War, and flagrante belli, the common law has never interfered with the army, "inter arma silent leges" (*Barwise* v. *Keppel*, 2 Wilson's Reports, 318). The latter is laid down as a distinct proposition, that in the face of the enemy, whether at home or abroad, the common law does not interfere with the army, *i. e.*, of course, with its conduct as an army, towards the enemy; with the acts of soldiers as soldiers, under orders against the enemy. Thus by a great judge nearer our own time, it was put entirely on that principle, that it was in face of an enemy (Lawrence, J., *Warden* v. *Bailey*, 4 Taunton's Reports, 70). It is true that the Mutiny Act and Articles of War would apply to soldiers (*Grant* v. *Gould*, 2 H. Blackstone, 67; *Bradley* v. *Arthur*, 4 Barnwall and Cresswell's Reports); and it is also true that they are subject to military law and military tribunals, but it is also true that a soldier is gifted with all the rights of other citizens (*Burdett* v. *Abbott*, 4 Taunt. 449), and can no more be deprived of those rights by prerogative than any other subjects and citizens, except only by virtue of some paramount necessity, for the sake of the safety of the entire community; and it is accordingly only on that principle that martial law, whether as to soldiers or others, has ever been vindicated. Thus, more than half a century after the above system of military law had been established by statute in this country, the great commentator wrote thus:— "Martial law is built upon no settled principles, but is entirely arbitrary in its decision, and is in truth no law, but something indulged rather than allowed as law, a temporary excrescence out of the distemper of the state

other class of subjects and citizens, involves and implies that they have at common law just the same rights and privileges as any others, and cannot be deprived of them by prerogative, or by virtue of enactment founded upon prerogative, except upon the ground of a paramount public necessity, and notwithstanding that, as far as possible, to protect them from arbitrary power, their offences and penalties are so carefully defined by statute and statutable regulation, it is well recognised that in presence of actual war, these rules do not control the power of the Crown in the exercise of its prerogative in regard to the army; and that, in presence of an enemy, at all events out of this country, certainly in an enemy's country, the Crown acts by prerogative, in the exercise of an absolute discretionary military authority; and all these rules, on occasions of emergency, may be dispensed with, on the ground of necessity, and the most summary procedure allowed, if only there is an honest inquiry, and an apparent necessity (*a*).

and not any part of the permanent and perpetual laws of the kingdom. The necessity of order and discipline is the only thing which can give it countenance; and, therefore, it ought not to be permitted in time of peace, when the King's courts are open for all persons to receive justice according to the law of the land" (*Blackstone's Commentaries*, vol. i., edition 1850, p. 143). Now, whether or not this was meant of martial law as applied to soldiers, it was written with reference to the distinction between time of peace and war, and the same necessity which renders martial or military law necessary as to soldiers in time of peace or war, may render it necessary as to all classes in time of rebellion; and if there is such necessity, there is no less reason or justice in its application to others than to soldiers, who are liable to it only by reason of necessity for the peace and welfare of the community.

(*a*) That military authority is absolute in actual war, and in presence of the enemy, at all events out of this country, and as regards soldiers, has been solemnly established by the House of Lords in a very celebrated case. In the great case of *Sutton* v. *Johnston*, 1 Term Rep. 548, the judgments of Lords Mansfield and Loughborough were to this effect:—that [illegible] lies for the abuse of a military discretionary [illegible] authority in time of war, and that a court of common law in such a case could not assume a jurisdiction, that a Commander had a discretionary power by the military code to arrest, suspend, and put upon trial, any man in his force; and that a court-martial

not less than military law, recognise for military persons, or persons under martial law, in times of mutiny, or rebellion, or war, what are called in military language "drum-head courts-martial," in which, when the danger is so great and pressing that the ordinary mode of summary courts-martial cannot be followed, so many officers as can be got together are assembled hastily, and are authorised to proceed summarily, without any other inquiry than is possible under the circumstances.

degree, the validity of that excuse, if the foundation for it did exist in point of fact, and if there did exist a mutiny which required the strong arm of power to repress, if it was so dangerous in its probable and immediate consequences as to *supersede the ordinary power of trial for such offences*. There may be circumstances which may constitute a sufficient defence for a military officer in the infliction of punishment, without either a regimental or general court-martial; for if there be that degree of imminent necessity existing which supersedes the recourse to any ordinary tribunal; if there be actually that flagrant mutiny which must either be repressed with force, and by the immediate, though irregular application of severe punishment, or must be left to rage uncontrolled, at the utmost peril of public rights; that which is irregular becomes, if that which is regular cannot be resorted to, itself regular and capable of being justified upon every principle of public duty, for it imports the public safety that the means of resisting an enormous and overbearing evil should be as strong, sudden, and capable of application, as the evil itself is capable of immediate, mischievous effect; but if it appears that there was no mutiny and no crime, and *no trial*, and that in addition to that there was malignity of motive, then the case leads to the contrary conclusion." Thus in that case, the Lord Chief Baron, commenting on the evidence of a witness who stated that he knew what drum-head courts-martial were, but that in the case in question the prisoner was not allowed to make any defence, said, "I suppose drum-head courts-martial mean that when the alarm is such, and the danger is so great, that the regular mode of summoning courts-martial cannot be followed, so many officers as are upon the spot are to be summoned together; but that they are not to proceed altogether without any regard to the interest of the prisoner, though they may not proceed exactly according to the directions laid down in the Articles of War." So in a later case, it was said, "It was enough if the substance of the matter, or the corpus delicti, sufficiently appeared to enable them to get at the truth and justice of the case. The natural leaning of the courts of common law, it was said, was in favour of prisoners, and judges gave way too easily to formal objections on the part of the prisoners; but courts-martial abroad were not necessarily bound by the rules of proceedings

But all this can only be allowable, as regards soldiers, on the ground of a paramount necessity, because soldiers are as much entitled to the rights of free citizens as any other class of subjects (*a*), and the others have no greater rights than soldiers. It would be an entire fallacy to suppose that soldiers are peculiarly subject to arbitrary power, or any more so than other classes, except only in so far as it is unavoidable by reason of necessity, with reference to the safety of the community. The same principle must apply to all other classes, and all classes are equally liable

in our courts here." And the court said, "We are not sitting on a court of error, to review the regularity of their proceedings; *nor are we to hunt after possible objections.* It is enough that we find a sentence pronounced by a court of competent jurisdiction to inquire into the offence, and with power to inflict such a punishment" (*R.* v. *Suddis*, 1 East. 317).

(*a*) Thus, in the case of Sir Francis Burdett, in 1812, the Chief Justice said, "Since much has been said about soldiers, I will correct a strange mistaken notion that has got abroad, that because men are soldiers they cease to be citizens. *A soldier is gifted with all the rights of other citizens*" (Chief Justice Mansfield, *Burdett* v. *Abbott*, 4 Taunton's Reports, 449). Soldiers could not be deprived of common law rights but by prerogative or statute, based on necessity; and when war arises, they may be deprived, by virtue of that necessity, of those rights, even beyond the extent to which they are deprived by statute; and on reason and principle other classes may equally be deprived of those rights by the same necessity. That necessity arises when the country is the scene of war which convulses it and destroys it. "When the courts of justice are open to distribute justice to all, it is said to be a time of peace. But when, by invasion, rebellion, &c., the peaceable course of justice is stopped, then it is said to be a time of war. It shall not be tried by a jury, but by the judges, whether justice at such a time has her equal course of proceeding or no. For time of war doth not only give privilege to them that are in the war, but to all others within the kingdom. The military rule includes the soldiers; but in time of war, particular orders are always made for the due order and discipline of the soldiers, which we must consult upon all emergencies, and not expect any standing or perpetual law on that account. But it appears that if any one in time of peace put to death any man by colour of martial law, it is murder, and contrary to Magna Charta" (*Wood's Institutes*, B. 1, c. v.). But now an Act of Parliament is passed yearly, empowering the king to appoint courts-martial, *though in times of peace.* But for statute, this could not be legal even as to soldiers in time of peace, but in time of war it is so by prerogative, founded on necessity, with

to be deprived temporarily of their common law privileges, and placed temporarily under arbitrary power, when necessary for the peace and safety of the community. The question, therefore, is, when is there such a necessity? The answer is, that it may arise, as to any class, in a country the scene of war or rebellion.

It will be seen from the Articles of War that military law, as to soldiers, is extremely severe; and that, whether with reference to the offences it constitutes, or the penalties it inflicts, it is widely different from ordinary law, and infinitely more onerous and penal (*a*). And it has always

reference to the safety of the community. And the same necessity is the basis of the Mutiny Act. "The military law, as exercised by the authority of Parliament and the Mutiny Act, with the Articles of War, is not to be confounded with that different branch of the royal prerogative called martial law, which is only to be exercised in time of rebellion" (*MacArthur on Court-Martial*, 1). The definition of martial law in *Cowell's Law Dictionary*, is, "Martial law is the law of war, and depends on the just but arbitrary power of the king, or his lieutenant; for although the king does not make any law, but by the common consent in Parliament, yet in time of war, by reason of the necessity of it to guard against dangers that often arise, he useth absolute power, so that his will is a law." The same necessity allows of the temporary suspension of the civil rights of other classes. Thus it is said, "There are extraordinary seasons when the body politic, like the natural, is affected by disease, and when absolute necessity authorises the application of extraordinary remedies. In ordinary times the personal liberty of individuals cannot be abridged at the mere discretion of any magistrate, nor without the production of the prisoner in court," and so on; "but in times of turbulence and danger these securities of personal liberty must yield to the greater object, the security of the state, and the legislature authorises for a time the suspension of the statute of habeas corpus. So likewise the common and statute law, which in ordinary times is adequate to the coercion of all offences, may be found, in times of extraordinary turbulence and alarm, utterly inadequate to the repression of the most dangerous crimes against the state. The slow and cautious procedure of the King's ordinary courts of justice keeps no pace with that daring celerity which attends the operations of rebellion;" "in such seasons, therefore, the constitution possesses in itself that remedy which is necessary for its own preservation" (*Tytler's Military Law*).

(*a*) And this can only be, and always has been, excused on the ground of necessity, and with a view to the general safety of the community. "The army being established by the authority of the legis-

been avowed that, as soldiers are free citizens, this can only be excused on the ground of necessity. But, beyond this, it seems admitted that, in time of war, or mutiny, even in the dominions of the Crown, even this law may be exceeded or departed from, and that, at all events, without observing its rules or its formalities, still more summary justice may be justified, on the ground of a necessity, arising out of an extraordinary emergency. This is martial law in the strict sense of the term, as the law only of war; and it can only be justified as regards soldiers, who are as much citizens and subjects of a free state, as others—on the ground of necessity, which may equally justify it as regards other subjects, who are no more citizens and subjects than soldiers.

All the arguments and considerations which support the allowance of such a power, as regards the loyal soldiers of the Crown, who, if they lapse into military disorder, may become dangerous to the state, and destroy the peace of the realm, apply, not only à multi fortiori, but with infinitely greater force, to the case of a rebellion, seeing that a rebel army, or an army of rebels, as they are in fact and

lature, it is an indispensable requisite of that establishment that there should be order and discipline kept up in it; that the persons who compose the army, for all offences in their military capacity, should be subject to trial by their officers. That has *induced the absolute necessity for a Mutiny Act accompanying the army.* And it has been said that as there was an army established, and *even if the army was to be disbanded, there must be a Mutiny Act for the safety of the country.*" "It is one object of the Act to provide for the army; but there is a *much greater* cause for the existence of a Mutiny Act, and that is, the *preservation of the peace and safety of the kingdom*; for there is *nothing so dangerous to the public safety as a numerous and undisciplined army;* and every country which has a standing army is guarded and protected by a Mutiny Act. An *undisciplined soldiery* are apt to be too many for the civil power; all history and all experience give the strongest testimony to this (Lord Loughborough, *Grant* v. *Gould*, 2 Henry Blackstone's Rep. 100). But this, it will be observed, applies à multi fortiori to a *rebel* army, or an army of *rebels;* who, of course, are infinitely more dangerous to the country than a loyal army, who is *not* undisciplined; a rebel army being undisciplined, and *also* disloyal in a *state of standing mutiny.*

in contemplation of law, soldiers—so are soldiers, in actual hostility to the Crown and the loyal subjects of the nation; and, therefore, are in the position of causing not a possible or future danger, but an immediate or present danger to the State. Being soldiers in fact, they are not the less so because they are not loyal, but disloyal; and they are all the more dangerous to the State, because, being in rebellion, they are in a state of standing mutiny. Legal principle, therefore, not less than sound policy and absolute necessity, requires that men in armed rebellion, being in a state of de facto war, should be liable to be treated as soldiers, and liable to the same summary measures as soldiers in a state of mutiny. And thus it is that martial law is allowed in England in time of rebellion.

That armed rebellion is war against the Crown (*a*), is a

(*a*) All of our text writers speak of rebellion as war; and the whole law of treason is founded upon this doctrine, as it is treason even to conspire to levy war against the Crown, and it seems to follow that those engaged in the rebellion are, in the view of the law, soldiers. It has always been laid down that insurrections of an armed force amount to war against the Crown, whether or not accompanied with military discipline or weapons (*Foster's Crown Law*, p. 33). Thus, Mr. Justice Foster, in his Crown Law, lays it down that attacking the king's forces in opposition to his authority is *levying war* against him (s. 10). Insurrections in order to throw down all enclosures, to alter the established law, or change religion, or open all prisons, all risings in order to effect these innovations of a public and general concern by an armed force, are high treason *within the clause of levying war* (*ibid*). The distinction is drawn between the offence of compassing or conspiring this, which is treason, and the actual levying of war, which is *not only* treason, but open traitorous rebellion; and it is the latter and not the former with which martial law is necessary to deal. That great lawyer, Sir John Campbell, when Attorney-General, cited these authorities in Frost's case, and stated their effect tersely thus:—"Levying war against the Crown is where there is an armed force seeking to supersede the law, and to gain some public object (*Regina* v. *Frost*, 9 Carrington & Payne's rep. 141). And that law was affirmed and applied by that venerable and learned judge, the late Lord Chief Justice Tindal (*ibid*, 161). There must be an insurrection, and force accompanying it, and an object of a public nature (*ibid*). And Lord Tenterden laid it down that the pomp and circumstance of military array, such as usually attend regular warfare, are by no means necessary to constitute an actual levying of war. In-

proposition which, as it is laid down by the earliest and most ancient, so it is equally laid down by the latest and most recent authorities of the law of England upon the subject, and that war against the Crown involves the correlative right on the part of the Crown to levy war in order to subdue the rebellion, and use military power, so far as is necessary for that purpose, appears to be a proposition equally undoubted, and to follow necessarily from the first duty of the Crown to preserve the peace of the realm.

That in a country the scene of war, whether in or out of the Queen's dominions (*a*), and whether the state of war is caused by invasion or by rebellion, the common law

surrections and risings for the purpose of effecting by force and numbers, however ill-arranged, provided, or organised, any innovation of a public nature, for redress of supposed public grievances, in which the parties had no special or particular interest or concern, have been deemed instances of the actual levying of war. Rebellion at its first commencement is rarely found in military discipline or array, although a little success may soon enable its actors to assume them" (33 State Trials, 684).

(*a*) It is upon this principle, that although the joining with rebels in an act of rebellion will make a man a traitor within the clause of levying war; yet, if this is done for fear of death, and while the party is under actual force, if enemies or rebels come with a superior force and exact contributions or live upon the country at free quarter, submission in these cases is not criminal; for flagrante belli the jus belli taketh place, *it is the only law then subsisting* (*Foster's Criminal Law*, 217). And the sending intelligence to a rebel makes a man a traitor. No doubt, so long as it is reasonably possible for the civil power to exert itself, the law protects it by making all resistance which ends in death, murder, and all death inflicted necessary in self-defence, justifiable homicide; and so that great lawyer says: "If a minister of justice be present at a riot, and in order to keep the peace produce his staff or other known ensign of authority, this will be sufficient notification with what intent he interposes, and if after this, resistance is made, and he or any of his assistants killed, it will be murder" (*ibid.* 311). But it is obvious that when a riot is rebellious, peace officers are powerless, and will not enter into such jeopardy, and then, *de facto*, the course of the common law is stopped. The same great author lays down that officers of justice, in the execution of their office, are under the peculiar protection of the law, and every man lending his assistance for the keeping of the peace; and this protection extends to the case of private persons interposing to *prevent mischief* or *appprehend felons* (*ibid.* 309.) But all this, it will be observed, implies that the civil power or the loyal subject will run the risk of

admits itself suspended or superseded, at all events in the face of the enemy, and for so long as is necessary, by military power; and that, in the case of rebellion, this applies to all engaged in or aiding the rebellion, is a proposition which is not without high legal and even judicial authority, and seems, indeed, to demonstrate its own truth, by the self-evident law of necessity. For, as a matter of fact, the country is under military power, and, if the exercise of that power were to be hampered and fettered by legal liability, civil or criminal, it would be obviously impossible to carry on military operations, or preserve the safety of the army, or the loyal portion of the community. Nor does

attempting these things, and if they *do*, the law is their warrant; but if they *cannot* reasonably attempt it, the rebellion being so violent, not a word is said in any book of criminal law or common law as to power, with deadly weapons, to *attack* the unlawful and treasonable assembly and slay them; which is war, and being war, is left to the law of war, and can only be lawful when the Crown has declared war, which suspends the common law. On the above principle, it was long ago laid down that, flagrante belli, the common law has never interfered with the army: inter arma silent leges (*Barwise* v. *Keppel*, 2 Wilson's rep. 318). This could not merely mean as between soldiers, for soldiers are not less citizens than others, and not one whit more liable to have their civil rights suspended than any other class; nor could those rights be suspended as to any class except by necessity and for the safety of the community, and for the same reason the rights of all classes might be suspended. And then, again, rebels in arms *are* soldiers, and soldiers in rebellion. In *Grant* v. *Gould*, 2 Hen. Blackstone's rep., Lord Loughborough puts the case of spies or intelligence to the enemy, as coming under the martial law; and though he truly says martial law, in its larger sense, as including *all* offences of soldiers, is exploded, he never meant to lay it down that in time of actual war, and in the presence of the enemy, martial law is not lawful; so since soldiers are just as much citizens as civilians, yet it has never been maintained that in presence of the enemy the Articles of War limit the power of the Crown. And in *Foster's Crown Law*, 219, and *McArthur on Court-Martial*, 59, it is laid down that intelligence to a rebel is criminal and capital when the rebel is a fellow subject in actual rebellion in the dominions of the Crown. And unless it be contended that in the presence of the enemy a spy could not be dealt with under martial law, the proposition in the text can hardly be disputed; for war is war, whether caused by rebellion or invasion, and is so considered by the legislature in various statutes, as, for instance, the Militia Acts.

it seem possible that there can be two different or even opposite laws prevailing at the same time in the same place; whence the legal maxim, "Inter arma silent leges."

Martial law, indeed, is but the development of the principles of the common law, in a state of war, which, being abnormal and exceptional, and beyond the range of its powers and procedure, is out of the scope of its rules, though not of its principles; and, as one of its fundamental principles is, that a rebel in arms against his Sovereign is liable to be treated as a soldier (*a*); so, when, by reason of

(*a*) It is upon this principle he may be slain in battle with the loyal soldiers of the Crown; and all writers lay down, he is a quasi soldier, bearing arms against the Government. The loyal soldiers become so by enlistment under the Crown; they, à multi fortiori, by enlisting against the Crown. Not, indeed, under the Mutiny Acts, which apply in terms only to those enlisted in the service of the Crown, but by a larger and older law; prior to Mutiny Acts and standing armies, by the common law, a rebel in arms is quasi a soldier, and liable to the pains and penalties of war, although being also a traitor, he is liable to the still more severe pains and penalties of treason. It would be strange, indeed, if he were in a better position than the loyal soldier of the Crown, who is as much a subject and citizen as the other, with this difference that he is a loyal subject and the other a rebellious one. Some persons seem to think that soldiers are out of the pale of the law, and that it is enough to say that they are soldiers to account for any application of arbitrary power; but this is a great error. A soldier is as much a free subject and a citizen as any others, and is entitled to all the rights of a free subject and citizen. Yet, in time of war, he may be deprived of those, which both common law and statute have provided for him. This is only on the ground of necessity, and the same necessity may apply the same principle to those who, being rebels in arms, are not *more subjects* than he is, because they are rebellious subjects, and are not less soldiers than he is because they are rebellious soldiers, whereas he is loyal. Hence, in entire accordance with legal principles, Lord Brougham laid it down, more than half a century ago, that the declaration of martial law renders every man liable to be treated as a soldier; which no doubt means, that the state of rebellion, which justifies martial law renders every rebel liable to be treated as a soldier, and therefore renders him liable to martial law; and this is cited and adopted in *Simmons on Court-Martial.* The declaration of martial law renders all persons answerable to courts-martial, and under the order of military authority, so long as the course of ordinary law does not take place (*Simmons on Court-Martial,* 14, 19, 98).

the power of numbers, in a posture of war, its own powers and process are suspended, it simply leaves to the military power the carrying out a principle which it *recognizes*, although, under the circumstances, it cannot *enforce*.

Hence the greatest and wisest sages of the common law (*a*), lay down principles which primarily imply and involve, that in a season of public peril and violent rebellion, the strict rules of the common law, which are established for times of peace, when the authority of the law can be enforced, may be suspended by the state of war, when declared by the Crown to exist, in consequence of

(*a*) Thus, the great writer already alluded to, Mr. Justice Foster, observes, "I am firmly persuaded that in cases such as these (of resistance to peace officers), a general submission to the known badges of authority, exacted from all persons—strangers to the party supposed to be injured—would greatly conduce to the stability of government, in the fate of which all private rights are involved. On the other hand, an undue countenance given to the spirit of popular opposition, upon the principles of false patriotism, has a fatal tendency to loosen the reins of government, and to throw matters into a general confusion. 'There is undoubtedly *a justice due to the community*, founded on the interest which every individual has in the public tranquillity, which, once destroyed, all private rights will sink and be absorbed in the general wreck; and if the common rights of the subject are supposed to be the object in view, let it be remembered that liberty is never more in danger than when it verges into licentiousness" (*Foster's Crown Law*, 317). The same great writer cites a statute (11 Hen. VII. c. 1), as *declaratory of the common law*, which declared that the subjects of England are bound by the duty of their allegiance to serve their sovereign in defence of him and his realm *against every rebellion* which may be raised against him, and enacted that no person attending the king in his wars shall, for such service, be convicted of any offence—a clear declaration, on the authority of Parliament and of this great lawyer, that the Crown may, to repress rebellion, levy war upon rebels, and that for homicides, committed in such suppression, they shall not be amenable to criminal law (*ibid*, 390), which implies that, but for the state of war thus created by the rebellion, and the authority of the Crown for its repression, there might be a criminal liability, as, undoubtedly, according to the strict rules of the common law there would be, when attacks were made by an armed force upon bodies of people. But, at all events, whether it is by the common law, as part of the common law, or only as allowed by the common law in consequence of the existence of a state of war, is a mere question of terms or of language; anyhow, the measures of war are declared legal.

such rebellion. So that the question would be, whether there was a rebellion which did raise such a state of war against the Crown. A question, necessarily, for the Crown.

It is a general principle of the law of England that, as the prerogative of the Crown is simply its right to do its duty, and it is admitted to be the duty of the Crown to preserve the peace of the realm and defend its loyal subjects against invasion or rebellion, so it is the right or prerogative of the Crown to do all that may be necessary for that purpose, and, therefore, to declare the state of war, and use the means and measures of war, if necessary, for the public safety. It is upon this general principle that it was always admitted to be the prerogative of the Crown, for the sake of public safety, to levy forces for repression of rebellion, or repelling of invasion, and, on this same principle of necessity, to exercise, long before statutes allowed it, martial law upon soldiers. Upon the same principle, our greatest lawyers have vindicated the right or prerogative of impressing seamen for the navy (*a*), a

(*a*) Thus, in *Foster's Crown Law*, the legality of impressment was established in a case in which a man was killed in resistance of it, and it was held manslaughter only, because the warrant had not been duly framed, otherwise the case would have been one of murder; and, on the other hand, if a man were killed who resisted impressment, it would be justifiable homicide. So that, indirectly, the prerogative affected life, and comes very near, indeed, to the case of martial law. "Uncommon pains having been taken to possess people with a notion that pressing for the sea service is a violation of Magna Charta, and a very high invasion of the liberty of the subject, the Recorder (Foster) thought fit to deliver his opinion touching the legality of pressing for the sea service, provided the persons are proper objects of the law, and those employed in the service came with a proper warrant for the purpose. The question touching the legality of pressing mariners for the public service is a point of very great and national importance. On the one hand, a very useful body of men seem to be put under hardships inconsistent with the temper and genius of a free government; on the other, the necessity of the case seemeth to entitle the public to the service of this body of men, wherever the safety of the whole calleth for it. We are not at present concerned to enquire whether persons may be legally pressed into the land service; but only whether mariners may not be pressed into the service of the Crown whenever the public safety

most odious and oppressive practice, but admitted to be justifiable on the ground of necessity for the public safety, and vindicated upon precisely the same principle as martial law for the suppression of rebellion: viz., the necessity of the case. In both cases, the prerogative is supported by usage, grounded on the common law, and recognized by statutes, partly by the absence of prohibition, and partly by direct recognition. The true ground, therefore, on which to base martial law is, that it is allowable when necessary for the suppression of rebellion, and the safety of the State, and that it is *legal because it is necessary.*

The great lawyers and judges who have vindicated the right or prerogative of impressment of seamen, or the prerogative, prior to and irrespective of any statute, of martial law in regard to soldiers—both soldiers and sailors being just as much the subjects and citizens of a free state as other classes, and entitled to all their rights as such—have vindicated these prerogatives upon principles and grounds equally applicable to the supposed prerogative

requires it; ne quid detrimenti respublica capeat. I think they may. The Crown hath a right to command the service of these people *whenever the public safety call for it. The same right that it hath to require the personal service of every man able to bear arms, in case of a sudden invasion* or *formidable insurrection* (which personal service (it is added in a note), in cases of extreme necessity, is a principal branch of the allegiance every subject oweth to the Crown, see 11 Hen. VII.). *The right, in both cases, is founded on one and the same principle, the necessity of the case, in order to the preservation of the whole.* According to my present apprehension (and I have taken some pains to inform myself), the right of impressing mariners for the public service is *a prerogative inherent in the Crown, and grounded upon common law, and recognized by many Acts of Parliament.* A general immemorial usage, not inconsistent with any statute, especially if it be the result of *evident necessity, and tendeth to the public safety,* is part of the common law. For the rights of the Crown and liberties of the subject stand principally upon the common law, though both have been, in many cases, explained, confirmed, or ascertained by statute" (*Foster's Crown Law*, 159). Now this is language precisely applicable to the alleged prerogative of declaring war or proclaiming martial law for the suppression of rebellion. It is a prerogative inherent in the Crown, and founded on common law, and recognized by Acts of Parliament. It is the result of the evident necessity, and tendeth to the public safety.

of exercising martial law in time of rebellion. As the militia may be raised and levied at common law for repelling invasion and repressing rebellion, and as soldiers, when levied, were at common law put under martial law for the sake of the public safety, and lest they should be dangerous to the State, and as, for the same reason, sailors were allowed to be compulsorily impressed, and *slain if they resisted;* so, on the same principle, an army of rebels, which must needs be far more dangerous to the State than any loyal army, may be subjected to the severities of martial law; which is neither more nor less than the law of war applied to rebellion on the ground of a paramount necessity arising from an imminent danger to the State (*a*).

(*a*) Thus in the case already cited from *Foster's Crown Law*, that great Judge said, "I do admit that I know of no statute which directly, and in express terms, empowereth the Crown to press mariners into the service; and admitting that the prerogative is grounded on immemorial usage, I know of no necessity for such statute. For let it be remembered that a prerogative grounded upon general immemorial usage not inconsistent with any statute, nor repugnant to the public utility, is as much part of the law of England as statute law, and that the statutes which mention pressing as a practice then subsisting, and not disallowed, are at least an evidence of the usage, if they go no further, and do not amount to a tacit approbation of it. For it is hard to conceive that the legislature should frequently mention a practice utterly illegal, repugnant to the principles of the constitution, as subsisting, without some mark of disapprobation" (*ibid*). This language also is eminently applicable to martial law, for while the Petition of Right mentions with reprobation commissions of martial law for trial of ordinary offences, it mentions without reprobation, and with implied approbation, martial law "as is used in armies in time of war;" and subsequent statutes, or the Irish Rebellion Acts, distinctly affirm the prerogative to exercise martial law in time of rebellion. "Against what I have said, it may be objected that the practice of pressing is inconsistent with the liberty of the subject, and a breach of Magna Charta. I readily admit that an impress is a restraint upon natural liberty. But if the restraint, be it to what degree soever appeareth to be necessary to the good and welfare of the whole, and to be warranted by statute law as by immemorial usage, it cannot be complained of otherwise than as a private mischief, which must, under all Governments, be submitted to for the avoiding of public inconvenience. As to Magna Charta, it is not pretended that the practice of pressing mariners for the public service is condemned by express words in that statute; and if it be warranted by common law and statute law, it cannot

These prerogatives are rested upon the common ground of necessity for the public safety, and of the right of the Crown to take all such means as are necessary for its safety; and, among others, the means or measures of war.

The question, therefore, of the legality of the application of the measures or the laws of war, to any subjects of the realm, resolving itself, at common law, into a question of necessity—the question, in case of a rebellion, what constitutes such a necessity? This, it is obvious, resolves itself into a question of the sufficiency of the means and measures of common law; for if these are sufficient, *i.e.*, legally and actually sufficient, of course there can be no necessity for any other. This question then resolves itself into the twofold enquiry as to legal sufficiency and

be shown to be illegal by any consequences drawn from Magna Charta; in like manner, as pressing for the land service could not be deemed illegal nor inconsistent with the principles of our constitution while there were temporary acts to warrant it. Besides which, we know that Magna Charta hath been expressly confirmed by many Acts of Parliament, and yet the practice of pressing mariners has still continued through all ages, and was never mentioned in any of those Acts as illegal, or a violation of the great charter" (*Foster's Crim. Law*, 175). This language, again, is extremely applicable to martial law, which, as applicable to rebellion, and rebellion alone, has never been condemned in any statute, though exercised in every age, but, on the contrary, has been confirmed by several. So Lord Mansfield said, "The power of pressing is founded upon immemorial usage, allowed for ages. If it be so founded and allowed for ages, it can have no ground to stand upon, *nor can it be vindicated or justified by any reason but the safety of the State.* And the practice is deduced from the trite maxim of the constitutional law of England, that private mischief had better be submitted to than that public detriment should arise" (*Rex* v. *Tubbs*, Cowper's Rep. 518). So the great commentator said, "The practice of impressing—the legality of which is now fully established—is only defensible from public necessity, to which all private considerations must give way (*Blackstone's Commentaries*, vol. 1, c. 8). So the exercise of martial law as to soldiers (which, as Hale shows, arose out of prerogative in time of war), is justified by the same principle. The army being established by the authority of the legislature, it is indispensable that there should be order and discipline kept in it, and this has *induced the absolute necessity for a Mutiny Act*, and it has been said that even if the army were disbanded, there must be a Mutiny Act for the safety of the country (*Grant* v. *Gould*, 2 H. Blackst. Rep. 100). The same principle applies à multo fortiori to an army of rebels.

actual sufficiency—what may be done at common law without a sufficient force, and what is a sufficient force to do what may thus legally be done? The first is a question of law, the other of fact depending on the circumstances. The former also includes and involves two questions, one of mixed law and fact, *i. e.*, that there is a rebellion, which must first be assumed, or no question arises at all. Assuming such a rebellion, then the question of pure law arises, what may be done legally, at common law, or aided by any statute (*a*), in its suppression? Upon the former of these questions at common law there may be great doubt and difficulty as to what makes a tumult rebellious, and as to when armed force may be used against it.

(*a*) This subject is treated of very fully by Hawkins in his *Pleas of the Crown*, B. 1, c. 65, of riots, routs, and unlawful assemblies, in which he first defines what is a riot, rout, or unlawful assembly, and then how they may be suppressed and punished by statute, and it is observable how guarded he is. He first defines a riot to be a tumultuous disturbance by persons assembling of their own authority, with an intent to assist each other in some enterprise of a private nature, and afterwards executing it in a violent and turbulent manner to the terror of the people, whether the act intended were lawful or unlawful. He distinguishes tumults for a general and public purpose, as to redress public grievances, or to pull down all enclosures, &c., and says if the people attempt with force to execute such intentions they are guilty of levying war against the Crown, which is rebellion. But that is a question of intention. "Wherever more than three persons use force and violence in the execution of any design wherein the law does not allow the use of force, all who are concerned therein are riotous. But in some cases where the law authorises force, it is not only lawful but commendable to make use of it; as for a sheriff or constable, or perhaps even a private person, to assemble a competent number of people in order with force to suppress rebels, or rioters, or enemies, and afterwards with such force actually to suppress them" (*Hawkins' Pleas of the Crown*, B. 1, c. 65, s. 2). It is clear that every sheriff, &c., may and ought to do all that in them lies towards the suppression of a riot, and may command all other persons whatever to assist them—which of course includes soldiers. Also it hath been holden that private persons may arm themselves in order to suppress a riot, from which it seems clearly to follow that they may also make use of arms in the suppressing of it if there be a necessity for so doing. However, it seems to be extremely hazardous for private persons to proceed to these extremities, and therefore such violent methods seem only proper against such riots as savour of rebellion, *for the suppressing whereof no remedies can be too sharp or severe.*"

Even assuming an unlawful and riotous assembly, at common law, there are great difficulties at common law on both these points. There is the difficulty arising from the strict rules of the common law, as to homicide caused by the use of an armed force, or deadly weapons. The common law only justifies homicide so caused, either when it is strictly in self-defence against unlawful violence (*a*), or in apprehension of a felon by lawful authority, and the necessary

(*a*) This at common law is construed very strictly, and usually it must be against present or imminent personal violence. Thus, if a ship's sentinel shoot a man because he persists in approaching the ship when he has been ordered not to do so, it will be murder unless such an act was necessary for the ship's safety (*Rex* v. *Thomas*, 1 Russ. C. & M. 510). *Semble*, that where guns are fired by one vessel at another vessel, and those on board her generally, those guns are to be considered as shot at each individual on board her (*Rex* v. *Bailey*, R. & R. C. C. 1). On the other hand, strict legal authority is rigidly required at common law, and an illegal authority may be resisted to the death. Thus, if a person be impressed who is not a proper object of impressment, or if the impressment be made without any legal warrant, it is lawful for the party to make resistance, and if the death of any of the parties concerned ensue, it is murder (*Rex* v. *Dixon*, 1 East, P. C. 313; *S. P. Rex* v. *Rokeby*, 1 East, P. C. 12). If a gamekeeper attempting lawfully to apprehend a poacher be met with violence, and in opposition to such violence, and in self-defence, strike the poacher, and then is killed by the poacher, it will be murder (*Rex* v. *James Ball*, M. C. C. R. 333). Attempting illegally to arrest a man is sufficient to reduce killing the person making the attempt to manslaughter, though the arrest was not actually made, and though the prisoner had armed himself with a deadly weapon to resist such attempt, if the prisoner was in such a situation that he could not have escaped from the arrest; and it is not necessary that he should have given warning to the person attempting to arrest him before he struck the blow (*Rex* v. *Thompson*, 1 R. & M. C. C. 80). And see *Rex* v. *Gillow*, 1 R. & M. C. C. 85. If a constable take a man without warrant upon a charge which gives him no authority to do so, and the prisoner runs away and is pursued by J. S., who was with the constable all the time, and charged by him to assist, and the man kill J. S. to prevent his retaking him, it will not be murder, but manslaughter only, because, if the original arrest was illegal, the recaption would have been so likewise (*Rex* v. *Curvan*, R. & M. C. C. R. 132). Where a common soldier stabbed a sergeant in the same regiment who had arrested him for some alleged misdemeanour:—Held, that as the articles of war were not produced, by which the arrest might have been justified, it was only manslaughter, as no authority appeared for the arrest (*Rex* v. *Withers*, 1 East, P. C. 295, 360).

use of force in case of his resistance (*a*), or in prevention of a felonious and violent outrage, as arson or murder, and *then* only when necessary for the purpose of prevention, and when the killing will prevent it (*b*). It is obvious that these rules render it very hazardous at common law to use armed force against an assembly merely unlawful and not felonious, and even in that case such force can only be used for dispersion, or for apprehension, or for self-defence in such dispersion or apprehension.

(*a*) Killing an officer will amount to murder, though he had no warrant, and was not present when any felony was committed, but takes the party upon a charge only; and though such charge does not in terms specify all the particulars necessary to constitute the felony (*Rex* v. *Ford*, 1 Russ. C. & M. 504; R. & R. C. C. 329). In order to render the killing of an officer of justice, whether he be authorised in right of his office or by warrant, amount to murder upon his interference in an affray, it is necessary that he should have given some notification of his being an officer, and of the intent with which he interfered (*Rex* v. *Gordon*, 1 East, P. C. 315, 352). But a small matter will amount to due notification (*ibid*). Killing an officer who attempts to arrest a man will be murder, though the officer had no warrant, and though the man has done nothing for which he was liable to be arrested, if the officer has a charge against him for felony, and the man knows the individual to be an officer, though the officer do not notify to him that he has such a charge (*Rex* v. *Woolmer*, M. C. C. R. 334). And the nine judges (four contra) held that a watchman could legally arrest a prisoner without saying that he had a charge of robbery against him, though the prisoner had, in fact, done nothing to warrant the arrest, and that if death ensued it would be murder (*ibid*). And it will be no excuse for killing an officer that he was proceeding to handcuff the party who was in his possession upon a charge of felony (*ibid*).

(*b*) Thus, in Sir. F. Burdett's case, the Chief Justice says, "If it is necessary, for the purpose of preventing mischief, or for the execution of the law (as in effecting an arrest by the civil authority), it is not only the right but the duty of soldiers to exert themselves in assisting the execution of a legal process, or to prevent any crime from being committed. It is a mistake to suppose that, because men are soldiers, they cease to be citizens; a soldier is bound to all the duties of other citizens, and gifted with all the rights of other citizens, and he is as much bound to prevent a breach of the peace or felony as any other citizen. In 1780 this mistake extended to an alarming degree; soldiers with arms in their hands stood by and *saw felonies committed, houses burnt and pulled down before their eyes*, by persons whom *they might lawfully have killed if they could not otherwise prevent them*" (*Burdett* v. *Abbott*, 4 Taunton's Reports, 449).

It was the experience of these doubts and difficulties which led to the Riot Act (*a*), which proceeds in an extremely cautious manner, and as much as possible in harmony with the common law. It abstains from directly authorising the use of armed force, even against a riotous and unlawful assembly. The Act, in the first place, makes the *persistence* in the riot felonious, so as to make all who remain in it felons, which, at common law, would authorise any one—soldier or civilian—in attempting to disperse or apprehend the rioters, and would make it justifiable homicide if, in so doing, they necessarily and unavoidably killed any of them; but having done that, it abstains from directly authorising any *attack* upon them by an armed force, and merely, in terms declaratory of the common law, authorises all persons, in aid of the civil power, to arrest or apprehend them.

(*a*) The 1 Geo. I. c. 5, an Act for preventing tumults and riotous assemblies, and for the speedy and effectual punishing the rioters, reciting that many rebellious riots and tumults had been raised, and that the punishments provided by the laws were not adequate, and then for the prosecuting and suppressing of such riots and tumults, and for the more speedy and effectual punishing the offenders, it enacted, that if any persons, to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together in disturbance of the peace, and being required by a justice of the peace, or sheriff, &c., to disperse themselves, shall unlawfully, riotously, and tumultuously remain together for an hour after such command by proclamation, then they shall be adjudged felons without benefit of clergy, and the offenders shall suffer death as in case of felony. Then, it is further provided that any peace-officer, and such other persons as shall be commanded to be assisting (which of course would include soldiers), are empowered to seize and apprehend such rioters; and if any of the rioters should happen to be killed, in the dispersing, seizing, or apprehending them, by reason of their resisting the persons dispersing or apprehending them, then all persons so killing them are indemnified. And it is further enacted that pulling down houses or preventing the proclamation shall be deemed to be felony. Now, here it is remarkable that there is no enactment in terms authorising an attack by an armed force upon the mob, though there is an express enactment declaratory of the common law, that, being made felons, they may be apprehended, and then, if in resisting apprehension they are unavoidably killed, the homicide is justifiable at common law. Being, however, a felonious assembly, probably

The Riot Act, or any similar statute directed merely to the dispersion of some tumultuous assembly in any particular spot, does not, it is manifest, meet the mischief of large and wandering masses of persons engaged in committing acts of outrage in various places. This mischief, it is manifest, when the masses are too large or too numerous to be dealt with by the civil power, or by the military merely acting in aid of the civil power, in the dispersion of mobs, in their apprehension and arrest for the purpose of trial, or for the prevention of acts of felonious outrage; can only be effectually met by the Crown declaring the

the troops might disperse them; and then again, if death ensued in resisting the dispersion, the homicide would be justifiable at common law. But *no attack* by an armed force is justified by the statute, and no killing of any man who can be apprehended; for it is a rigid rule of common law that a man who can be taken must be taken and tried, and it is only his violent resistance which can excuse homicide in the attempt to apprehend him. Although, as Hawkins lays down, this statute being wholly in the affirmative, cannot take away any part of the authority in the suppression of riot, before that time given by the common law; yet as the notion got rooted in men's minds that it contained all the power there was to justify the use of military force, there was great reluctance in using it, and hence the disasters which arose on the occasion of the riots of 1760 and 1777. Hawkins, however, points out clearly the distinction between a mere riot and a rebellion, and lays down that an unlawful assembling of people for redress of public grievances by force is levying of war against the Crown. Thus, Mr. Hallam observes, "that the Executive power has acquired such a coadjutor in the regular army, that it can in no probable emergency have much to apprehend from popular sedition" (*Const. Hist. Eng.*, vol. iii., p. 263). He elsewhere notices, in a note, the immense accession to the power of the Executive, arising from the Riot Act, which, combined with the *actual* power residing in the standing army, makes it irresistible. "Among the modern statutes, which have strengthened the hands of the Executive power, we should mention the Riot Act, 1 Geo. I. c. 5, whereby all persons tumultuously assembling, to the disturbance of the public peace, and not dispersing within one hour after proclamation made by a magistrate, are guilty of felony." The effect of which is, however, that the military, acting in aid of the civil power, may at once attack them. And it will be observed that it only applies to the dispersion of any tumultuous assembly; and although it so far augmented the legal power of the Executive that with the aid of an adequate armed force it went a long way to enable the Government to dispense with martial law, it still left great doubt and difficulty.

The greatest lawyers (*a*) have, in our own times, written with the utmost caution and doubt upon the subject of the power and province of the military when acting, at common law and in the exercise of common law rights or duties, in aid of the civil power, for the suppression of insurrection and the restoration of order. And although they have laid it down that all persons, soldiers or civilians, may act and use force, and even, if necessary, deadly weapons for the dispersion of insurrectionary assemblies, or the prevention of acts of felonious outrage, they also show that it is

and so might any number of men assembled or called together for the purpose. This doctrine he stated to be the true foundation for calling in the military to assist in quelling the late riots. Consequently, he said, the metropolis was not under martial law (*Adolphus' Hist. Eng.* vol. 3, p. 254). The resistance and suppression of actual riot or felonious outrage is not martial law, and does not require it: but it is to be observed that Mr. Hallam treats as sophistical the doctrine Lord Mansfield laid down, that the military may, without martial law, act to any extent necessary in suppression of actual insurrection. And when they attack large bodies of people not in arms, nor engaged in any felonious act, as they did in the Lord George Gordon riots, it is, to say the least, doubtful whether what they do is legal, and whether such cases may not require an Act of Indemnity. And to remove the difficulty occasioned by these doubts, is, indeed, one great object of declaring martial law. And it is manifest that the military on that occasion did not confine themselves to the prevention of actual outrage or the apprehension of offenders; they attacked bodies of people wherever they met them in the street, and slaughtered them, whether or not they were engaged in outrage, and in places where they could not possibly have been so; as, for instance, on Blackfriars Bridge, where great numbers were slain. There was no resistance, it was simply attacking the people wherever they were found in masses. It is impossible by any sophistry to bring this within the loosest definitions of the common law; and, therefore, the House of Commons, despite Lord Mansfield's sophistry, treated it, as it undoubtedly was, as a case of martial law, and adjourned, not thinking it proper to sit while the metropolis was under martial law.

(*a*) Thus, in 1807, Lord Ellenborough, then Attorney-General, gave an opinion on that clause in the Military Regulations which relates to the suppression of riots. "The military may act, in cases of *sudden and great emergency*, without the presence of a peace officer. I understand the disturbances here meant to be such as amount to the legal description of riots. The case plainly imports a breach of the peace by an assembled multitude. In case of any such sudden riot and disturbance, *any* subjects, without the

extremely doubtful how far armed force may be used even for those purposes, and more than doubtful whether it can be used for any other.

The powers of the common law in this respect appear to be limited to the mere dispersion of actual riot, the prevention of felonious outrage, or apprehension of persons guilty of such outrage. And the use of a[r]med force merely in aid of the civil power is extremely [h]azardous, whether with or without the authority of the [m]agistrate, for even for him it is necessary to *hit the exact line be-*

presence of a peace officer of any description, may arm themselves, and of course may use ordinary means of force to suppress such riot. And whatever any other class of subjects may do in this particular, the military may do also. By the common law, every description of peace officer may not only do what in him lies towards the suppression of riots, but may and ought to command all other persons to assist them. However, it is advisable to procure a justice of the peace to attend, and for the military to act under his orders. But still, in cases of *great and sudden emergency*, the military, as well as other individuals, may act without their presence." It will be observed how carefully this is limited to "great and sudden emergency," and to the dispersion of a riotous assembly. And it is to be added that it is extremely doubtful, looking at the Riot Act, how far this opinion could safely be acted upon by the case of armed force, unless against a mass of persons engaged in acts of felonious outrage, and for the purpose of prevention; for the terms of the Riot Act clearly imply that at common law, unless a tumult is rebellious and amounts to war, armed force could not, at common law, be used to disperse a mere unlawful assembly. And the opinion, perhaps, merely comes to this, that in *some* cases the use of armed force may be resorted to; but in what cases is left uncertain. Moreover, after all it was but an opinion; and since it was given, great judges have done all they could to elucidate the subject, and have left it still in doubt. Thus, for instance, on the occasion of what is popularly known as the "Manchester Massacre," when the military *attacked* an unarmed assembly, painful doubts arose as to the legality of *the act;* and although Sir F. Burdett was indicted and confined for publishing a statement that it was murder, it was not upon the ground that this was false, but on the ground that if it was true, it *was* murder; and that it tended to prevent a fair trial. "If unresisting men were cut down, whether by troops or not, it is murder" (Bayley, Baron, *The King* v. *Burdett*, 4 Barn. & Ald. Rep. 323). Thus, Mr. J. Littledale, in the Bristol riot case, said, "A party entrusted with the duty of putting down a riot, is *bound to hit the exact line*, between excess and failure of duty; the difficulty of his doing so—though it may be some ground for a lenient consideration of his conduct—can be no legal

tween excess and failure, so that, according to the judgment of the greatest judges, it is in the highest degree dangerous, even in the case of actual riot, to use armed force for its suppression, and from the responsibility involved in the use of it without the authority of the magistrate, or in directing the use of it, there is always great practical difficulty in its application to the protection of the loyal and the restoration of peace (*a*).

At common law, therefore, it is obvious, that even assuming the possession of an adequate military force, there

defence. And he added, "A military officer may act without the authority of the magistrate, if he chooses to take the responsibility; but though that is the strict law, there are few military men who will take it upon themselves to act, except on the *most pressing* occasions; and where it is likely to be attended with a great destruction of life, a man is generally unwilling to act without a magistrate's authority" (Mr. Justice Littledale, *Rex* v. *Pinney*, 3 Barn. & Adol. Rep. 914).

(*a*) It has been laid down by the common law, every private person may lawfully endeavour, on his own authority, without any command or sanction of a magistrate, to suppress a riot, by every means in his power. He may disperse or assist in dispersing those who are assembled; he may stay those who are engaged in it from executing their purpose; he may stop others whom he may see coming up from joining the rest. If the riot is dangerous, he may arm himself against evil doers; and if the *occasion demands immediate action*, it is the duty of every subject to act for himself in suppressing riotous and tumultuous assemblages. And he may be assured that whatever is done by him *honestly* in the execution of that object, will be justified by the common law. Nor is there any distinction in this respect between soldiers and private individuals. They have equally the rights and duties of citizens, and are equally bound to exercise the same discretion in acting in subordination to the civil magistrate, rather than on their own authority. But where the danger is pressing and immediate, where a felony has actually been committed, or cannot be otherwise prevented, and from the circumstances there is no opportunity of obtaining a requisition from the proper authorities, the military subjects of the Crown, like the civil subjects, are bound to do their utmost to *prevent the perpetration of outrage*, to put down riot and tumult; and to preserve *the lives and property of the people* (Tindal, L. C. J., in the case of the Bristol riots, cited in *Simmons on Court-Martial*, 93). It will be observed that the power of the military, without the sanction of the magistrates, is limited to prevention of actual felonious outrage, as arson or murder. Then, as to the power of magistrates to direct the military to act, it is strictly limited. Thus, while on the one hand it is laid down that military will do well

are great difficulties in the use of it for the purposes of *attack;* and although there are of course no difficulties in its use for the purposes of *defence,* and no legal difficulties in the way of its use for purposes of prevention of felony or apprehension of felons, there are, it is obvious, great practical difficulties in its application to the latter objects (*a*).

not to act without the authority of magistrates, it is equally laid down that this, at common law, involves no certain immunity. The general rules of law require of magistrates, at the time of a riot, that they should keep the peace, and restrain the rioters, and pursue and take them; and to enable them to do this, they may call on all the king's subjects to assist them, and all the king's subjects are bound to do so, upon reasonable warning. In point of law, a magistrate would be justified in giving fire-arms to those who thus come to assist him, but it would be imprudent in him to do so (*Rex* v. *Pinney,* 5 C. & P. 254; at bar in K. B., 3 B. & Ad. 946). "The magistrate is bound by law to do all he knows to be in his power that can reasonably be expected from a man of honesty and of ordinary prudence, firmness, and activity, under the circumstances. Mere honesty of intention is no defence, if he fails in his duty. Nor will it be a defence that he acted upon the best professional advice that could be obtained, on legal and military points, if his conduct has been faulty in point of law. Or, on the other hand, if he exceeds his power and occasions death, or other injury, he is liable to be proceeded against by indictment for murder or manslaughter; and, on the other hand, if he neglects his duty and does not do enough, he is liable to be proceeded against as culpably neglectful of his duty. He is bound *to hit the exact line* between excess and doing what is different. There is only one precise line, and how difficult it is to hit it; yet in law he is bound to hit it" (*Rex* v. *Pinney,* 3 B. & Adol. 946). It is not surprising that at common law, therefore, there should be the greatest difficulty, either in getting the military to act without the magistrates, or in getting the magistrates to direct them to act; and, on the occasion on which this was laid down—the occasion of the riots at Bristol—the most disastrous results occurred from the fatal hesitation caused by this difficulty and doubt as to the recourse to armed force to quell riot, not rebellion. "It has been held that private persons may arm themselves to suppress a riot, and it *seems* to follow that they may *make use* of arms if necessary; however, it *may be very hazardous* for private persons to proceed to this extreme, and such violent means seem only proper against such riots as savour of rebellion" (*Russell on Crimes,* 401). And all this applies only to *actual* riot.

(*a*) The former requires that a felony shall be actually *about to be committed* in the presence of the military, as Lord Chief Justice Mansfield put it—houses being burnt *before their eyes* (*Burdett* v. *Abbott,* 4 Taunt.), so that this requires acts of felony, as, of arson or of murder, actually going

And it is manifest, that when there is a formidable rebellion, the only effectual measures of repression may involve or require measures of attack on all bodies of people found together in a position of presumed and apparent hostility, which can hardly be safely ventured upon under the powers of the common law. Hence, when, *de facto*, there is thus a state of war, of necessity the law and usages of war prevail, of which the common law knows nothing and says nothing, according to the well-known legal maxim, "inter arma silent leges." In such a state of war, from the very necessity of the case, the laws of war prevail, because there are no other.

And if these difficulties arise as to the use of a military force when it is necessary for the suppression of rebellion; and when there is, as there always is in this country, an ample force at command, and the loyal and peaceably disposed are always in an overwhelming majority, so that a case for martial law, on the scope of necessity, can scarcely be supposed to arise, how much greater must be the difficulty where not only are these legal and practical difficulties, but where there is not an adequate military force, or

on, or about to be committed. That is to say, it involves that the military should catch the rioters *in the very act*, as they *might* have done at Bristol, or during the Lord George Gordon riots, but did *not* (by reason of the doubts and hesitation of the magistracy), and so had to *attack* the rioters *not* in the act, nor about to commit felonies, but merely being unlawfully assembled, with some probability that *some* of them might, sooner or later, commit such outrages, which is not enough to warrant an attack upon them with deadly weapons at common law. As to apprehension of persons for felony, there is still greater difficulty, for, of course, particular persons must be arrested for specific offences, to be brought home to each; and this illustrates the great difficulty of common law, that it deals with war as individuals, and not as in war, in bodies or in masses. And then as to defence: though there is no legal difficulty, there is this practical difficulty, that the rebels may take care not to wait the military, or not to attack them if they do; and this, it is notorious, has always been the policy of an insurgent force; and it is obvious that, unless the military can deal with them as enemies, and use all the measures of war to pursue and attack them in bodies, it may be useless to attempt to suppress the rebellion; and this was hardly allowable at common law.

where, even if there is, there is, as in the sister island has happened, a much greater disproportion between the forces on the side of loyalty and of rebellion, or, as may often happen abroad, a *preponderance* of force on the side of rebellion.

And, therefore, all writers of authority, military, legal, or constitutional (*a*), have laid it down, that martial law, under such circumstances, is allowable, as the law of social self-defence, superseding under the pressure, and, therefore, under the justification, of an extreme necessity, the ordinary

(*a*) The truth is, that when closely looked at, martial law or the law of war, is simply the extension of the law of self-defence; *for the loyal are not to be put to wait to be attacked*, and if not, then they must attack those who are in apparent and presumed hostility, otherwise there must be a certain number of loyal soldiers always *sacrificed*, if they are compelled to wait until they are fired upon, and thus a felony has been committed. This would be mercy to the rebels, and *murder* for the loyal soldiers of the Crown. The soldiers are to stand to be shot at, in order to have legal proof that the men they meet in a body are felonious rebels, and *then* they may return their fire. This practical absurdity and inequality illustrates the infirmity of the common law in dealing with the case of rebellion. In war, the difficulty is solved thus, that, in a district covered by the war, all bodies of men, not being under the command of the Crown, are presumed to be hostile, *and it is for them to surrender*, not for those they meet to solicit them to do so, and wait to be fired at, and killed.

(*a*) "It has ever been deemed constitutional for the sovereign in times of disorder and turbulence, to use the military power of the Crown for the speedy repression of enormities and the restoring of the public peace. It must be allowed that there are seasons, when the ordinary course of justice is, from its slow and regulated pace, utterly inadequate to the coercion of the most dangerous crimes against the State, when every moment is critical, and without some extraordinary remedy, the commonwealth would be lost. The extension of a power beyond the law is, therefore, in such times of danger, justified, on the principle of absolute necessity" (*Tytler on Military Law*, 52). The same author speaks of recourse to the legislature necessary to authorise trial by martial law, notwithstanding the ordinary courts of justice *are open* (159), as in the Irish Rebellion Act. "Martial law," wrote Mr. Serjeant Spankie, a learned lawyer, "is in fact the power of social self-defence, superseding, under the pressure, and therefore under the justification of an extreme necessity, the ordinary forms of justice. Courts-martial under martial law, or rather during the suspension of law, are invested with the power of administering that prompt and speedy justice, in cases presumed to be clearly and indisputably of the highest species of guilt.

forms of justice, and establishing the laws and severities of war. Military authorities, therefore, under martial law, or rather during the suspension of law, are invested with the power of administering prompt and speedy justice, exactly as on the occasion of a mutiny in an army—the object being self-preservation, by means of terror, and the example of speedy justice.

In such cases, by the great social law of self-defence, and by virtue of that necessity which overrides all law, the Crown, in the exercise of its prerogative, that is, of its right to do its duty, that duty being at all hazards to preserve the peace of the realm (*a*), resorts to the law of war,

The object is self-preservation, by terror; and the example of speedy justice" (Mr. Serjeant Spankie, Advocate-General of Bengal, cited in *Hough's Military Law*, 350). So the great text book of military law, which has been cited in the courts, and used in our army for the greater part of a century (*McArthur on Court-Martial*). "The military law, as exercised by the authority of Parliament, under the Mutiny Act annually passed, with the Articles of War, is not to be confounded with that different branch of the royal prerogative called martial law, which is only to be exercised in time of rebellion" (*McArthur on Court-Martial*, 1). And so it is laid down in *Simmons on Court-Martial*, 1-14. Martial law, an arbitrary law originating in emergencies, regulated by the expediency of the moment, and extending to all the inhabitants of a place or country (*Worcester's Dictionary, Martial*). "Martial law is quite a distinct thing" (*i. e.* from ordinary military law, which he had been just describing), "and is *founded on paramount necessity, and proclaimed by a military chief*" (1 *Kent's Commentaries*, 10th ed. p. 377). So, in all the law books, all the law dictionaries, for instance, "martial law is the law of war, in which the King, by his lieutenant, is absolute" (*vide Tomline's Law Dict.*).

(*a*) Thus, it was proclaimed and exercised in Ireland (the common law of which is the same as that of England) in the rebellion of 1798, previous to any statutes authorising it. In May, 1798, the insurrection broke out in the counties of Kildare and Carlow. The peasants had no arms but clumsy pikes and a few guns in bad order, they were of course easily defeated. All the prisoners taken by the soldiers were hanged *without any trial*, and there is reason to believe that many shared their fate who had not at all shared in the rebellion. When the news of these events reached Dublin, the Lord-Lieutenant issued a proclamation: "That his Majesty's general officers had orders to *punish according to martial law* by death or otherwise, as their judgment should approve, *all persons acting or in any manner assisting in the rebellion*." It was proposed to subject to the

and, there being de facto a state of war, pursues the laws and usages of war, that is, proclaims or declares martial law, which is neither more nor less than declaring that the state of war exists. And although it might be doubtful at common law, whether the exercise of martial law would be justifiable except in districts covered by the rebellion, yet if there were such a degree of danger in the district, by reason of its contiguity to the scene of actual rebellion, and imminent danger of its spreading, that might be enough to excuse an honest exercise of it under supreme authority, or even to justify it legally.

But the exercise of martial law in a district where not only there is no rebellion, but where the courts of law are actually sitting (*a*), so that there cannot possibly be any

operation of this proclamation the *state prisoners in Dublin*, but Lord Castlereagh *reprobated the proposal*. The cruelties committed by the militia in Wexford provoked an insurrection there, and horrible excesses were committed. Though the insurrection was confined to Wexford, the reign of terror established under this proclamation was extended over the whole south and east. Thus it was that the sheriff of Tipperary flogged Mr. Wright without any orders or authority; and this led to the case of *Wright* v. *Fitzgerald*, 28 State Trials, in which, as the act was obviously illegal, the plaintiff recovered damages. That, it will be observed, was a civil proceeding which turns on strict *legality* (*vide ante*), yet the judge indicated that there might have been a defence, even at common law, had there been any reasonable necessity and any fair trial, or any military authority; but there was neither trial, necessity, nor military authority, and the act was one of wanton and ignorant barbarity: such, beyond all doubt, as would have supported a charge of murder, had the man died.

(*a*) Thus was the case of *Wolfe Tone*, 27 State Trials, 615. He was captured on the coast of Ulster, the rebellion having been in Wexford, and being over; and he was carried to Dublin, where there was no rebellion and no martial law. He was tried by court-martial at Dublin barracks, and sentenced to death. An application was made to the court of Queen's Bench, by Mr. Curran, for a habeas corpus, on the ground that, as Mr. Tone had no commission from the King of England, he was to be regarded as a civilian, and a court-martial could have no cognizance of any crime imputed to him while the King's courts were sitting. "I do not pretend" (said Mr. Curran) "to say that Mr. Tone was not guilty of the charges of which he was accused: I presume the officers were honourable men; but it is stated in the affidavit, as a solemn fact, that Mr. Tone had no commission under His Majesty, and therefore no court-martial could have cogni-

reason for a trial by martial law, since, on the one hand, there is no interruption to the course of justice, and, on the other hand, there need be no *delay* in its course, would, of course, be clearly illegal, according to the principles already laid down, and accordingly such a proceeding *has* been declared illegal by one of the courts of this country.

So, even assuming martial law to be legally established in a district in rebellion, yet as the only proper scope for martial law is the suppression of actual rebellion, it follows that it is only overt acts of rebellion (*a*), or, at all events, overt acts in causing or aiding or abetting an actual re-

zance of any crime imputed to him, while the *Court of King's Bench sat in the capacity of the great criminal court of the land.* In times when war is raging, when man is opposed to man in the field, courts-martial might be endured; but every law and authority is with me whilst I stand upon this sacred and immutable principle of the Constitution—*that martial law and civil law are incompatible;* and that the former *must cease with the existence of the latter.*" Which plainly implies the converse.

(*a*) This is the true ground of Mr. Hargrave's opinion on the case of Mr. Grogan, who, after the suppression of the rebellion in Ireland, in 1798, was tried by court-martial, under martial law, for treason, and was executed. That execution, assuming the legality of martial law during the rebellion, was clearly illegal, upon the double ground that it was after the rebellion, and that it was treason, not rebellion—that is, a merely constructive treason, in compassing rebellion, not an open and overt act in aiding the rebellion. The case of Mr. Grogan, as appears from Mr. Hargrave's opinion, was one of constructive treason. "The question was, whether, upon the mere ground of prerogative power, authority could be given against persons taken into custody for *high treason* during the heat of rebellion, to try them by martial law for their offence. Looking to that question, he avowed himself under a conviction that martial law to *such an extent* was not the law of England. He saw, he said, the right to arrest those found in actual rebellion, and have them imprisoned for trial and punishment according to the law of treason; but he could not see that punishing and trying rebels according to martial law was, *when Mr. Grogan was tried and put to death,* part of the English law as it was administered in England or Ireland." That is, because the rebellion *was over.* "He avowed himself under a conviction that martial law to *such an extent* was not the law of England." Moreover, it appears that Mr. Grogan was tried for *high treason,* which might be for mere constructive treason, by conspiring to levy war, without any overt act; and such cases of constructive treason are not fit cases for martial law, which, according to its nature,

bellion, which can be proper subjects for the execution of martial law; and that, although undoubtedly the crime of treason may be committed by conspiring or compassing to levy war against the Crown, and this crime may be committed by inciting to rebellion, yet, as that is a crime rather of a constructive character, it is not a fit subject for trial in a summary way before a court-martial under martial law, and still less can such a course be justified after the rebellion is clearly over.

It would be necessary to have a statutory indemnity for acts either of excess or irregularity, *i. e.*, either for excess of jurisdiction, or for excesses in execution (*a*), for exercise of

should be restricted to open and overt acts of rebellion (*Hargrave's Jurisconsult Exercitations*, vol. i., p. 399). Thus also Mr. Serjeant Spankie, in his valuable exposition of the Indian Regulation on Martial Law and Rebellion (*Hough's Military Law*, 350), points out that it is only open and overt acts which are the proper subjects of martial law.

(*a*) Thus it was that bills of indemnity passed in the Irish Parliament after the excesses which took place in the exercise of martial law in that country in 1798—excesses, be it observed, owing not to the nature of martial law itself, so much as to the fierce passions of the country and the utter absence of due control over its exercise. The readers of the *Life and Letters of Lord Cornwallis* will not have failed to see that there was an utter absence of the due maintenance of military authority, and that had the exercise of martial law been placed under the restraints of military discipline, such excesses would not have occurred. The Irish Act of Indemnity recited that, "Whereas a traitorous conspiracy for the subversion of the authority of His Majesty and the Parliament, and for the destruction of the established constitution and government, hath unfortunately existed in this kingdom for a considerable time, and hath broken out in acts of the most daring and open rebellion. And whereas his Excellency Earl Camden, then Lord-Lieutenant, General, and General Governor of Ireland, did on the 30th of March, 1798, by and with the advice of the Privy Council of this kingdom, issue his most direct and positive orders to the officers commanding His Majesty's forces, to employ them with the utmost vigour and decision for the immediate suppression of the said rebellion, and did by his proclamation of the same date, by and with the advice of the Privy Council, notify the same; and whereas, notwithstanding the said orders so issued as aforesaid, the said rebellion did very considerably extend itself." Then it went on to indemnify in general terms those who had acted in the suppression of the rebellion, which was necessary to protect persons who had acted, however rashly and erroneously,

martial law before it had been declared, or where it had not been declared, or where it had been declared in districts where it could not legally be declared, by reason that they were not in actual rebellion, or for the execution of martial law on offences not properly coming within its scope, or without due care or reasonable evidence, or for the infliction of capital punishment carelessly, or of corporal punishment excessively; in all such cases there would be, if not an absolute necessity, at all events an apparent and probable necessity for a bill of indemnity, and such bills, therefore, have usually been passed; but it is to be borne in mind that, on the one hand, the proper scope for bills of indemnity is error or casual illegality, and not wilful and wholesale illegality; and that, on the other hand, no bill of indemnity ever drawn would be a protection against criminal liability for acts of wanton cruelty or malicious homicide.

And as it would be necessary to have statutory authority for the exercise of martial law in cases in which it could not be legally declared, so, on the other hand, as, when it could be legally proclaimed, it would be absolute military authority, and the regular military law, as contained in the Mutiny Act, would not in terms be applicable (as the Act applies only to soldiers enlisted in the service of the Crown),

yet honestly, though without due authority; and, on the other hand, would not cover acts wholly reckless and wicked and malicious. So the Imperial Act 43 Geo. III., c. 117, having provided that the Lord-Lieutenant may issue orders to the officers to take measures for the suppression of the rebellion, enacted that no act which should be done in pursuance of any order so given should be questioned in any court. And then it was provided that no act done, in pursuance of any orders so issued, should be questioned in any court of law; and to prevent any doubt which might arise, whether any act alleged to have been done in conformity with any order so issued, was so done, the Lord-Lieutenant might declare such act to have been so done, which should be conclusive; and all officers or soldiers who shall act under such orders, shall be responsible for all things which shall be so done, to courts-martial only, &c. All this, it is to be observed, was to be *without* proclamation of martial law, and whether or not martial law could legally be proclaimed; or, if it had been proclaimed, continued.

and would only be applicable to civilians taken in rebellion by a rough and rude kind of analogy; therefore, it would be equally necessary to have statutable enactments (*a*) directed either to allow of the exercise of martial law in a modified form, in cases where it would not be allowable at common law, or to restrain and regulate its exercise even in cases where it might at common law be declared, and to provide for a permanent exercise of some modified form of martial law, or its exercise for a considerable period, and to make provisions analogous to those of the Mutiny Act and

(*a*) Thus, the 3 & 4 Will. IV. c. 4, after reciting the existence of a dangerous conspiracy against the administration of that Act, manifested by open and daring outrages and tumultuous movements of large bodies of persons, who have by their numbers and violence created such general alarm and intimidation as *materially to impede* the due course of public justice, and frustrate the ordinary modes of criminal prosecution; and that meetings and assemblies, inconsistent with the public peace and safety, and with the exercise of government, had been held for some time past; and that the laws then in force were found inadequate to the prompt and effectual suppression of the mischief, and that the interposition of Parliament was necessary for the purpose of checking the further progress of the same" (all which might be without a case for martial law in a country where there is always so ample a military force); and then it enacted that the Lord-Lieutenant might, with the advice of the council, as occasion might require, issue his proclamation declaring any county to be in such a state of disturbance and insubordination as to require the application of the provisions of the Act; and such county shall then be deemed a proclaimed district (s. 4). That such proclamation shall warn the inhabitants to abstain from all seditious and unlawful assemblies or associations, and remain within their habitations between sunset and sunrise (s. 5). That all justices and officers of the forces shall take the most effectual measures, according to law, for suppressing insurrectionary and other disturbances and outrages in any part so proclaimed, and to search for and arrest all persons charged on oath with offences cognizable before the courts-martial (s. 7). That any person liable to be prosecuted for any offence committed within the district against any law prohibiting unlawful risings or assemblies, or preventing outrage or riot, &c., *shall be tried before court-martial* (s. 11). That such courts shall be constituted by commission from the Lord-Lieutenant (s. 13). That they shall consist of officers in Her Majesty's regular service, not less than five (s. 14). That there shall be a judge-advocate to attend the courts (s. 16). That persons charged with any of such offences may be summarily tried by such courts-martial, and the sentences, when confirmed, shall be executed (s. 18); provided that if the

Articles of War, as to the offences to be tried by courts-martial, the constitution of the courts-martial, their manner of procedure, and the like. And, accordingly, all these objects have been provided for by a statute of the Imperial Parliament as to Ireland.

But these statutes not only did not suggest that the exercise of martial law for the suppression of rebellion was illegal, or that they were necessary to authorize its exercise in time of actual rebellion, but they throughout plainly implied the contrary (*a*), and not only so, but they distinctly and

offence be punishable by death, the sentence shall be transportation (s. 21); and provided also, that such courts should not try cases of seditious libel, nor cases of combination or conspiracy, unless unaccompanied with actual force (*ibid*). But such offences, as possession of arms (s. 24), or making of signals, &c. (s. 27), may be tried by courts-martial.

(*a*) Thus the Imperial Act, 43 Geo. c. 117, recited that a treasonable and rebellious spirit existed in Ireland, and *had broken out* into acts of open murder and rebellion; and that persons who might be guilty of acts of outrage in prosecution of the rebellion, and who might be taken by Her Majesty's forces to be employed for the suppression of it, might seek to avail themselves of the ordinary course of the common law to evade the punishment of such crimes (which implied that the course of the common law was not, as it is notorious it was not, put a stop to, so that, strictly speaking, martial law would be illegal), *whereby it has become necessary for Parliament to interpose.* And it enacted that the Lord-Lieutenant might, from time to time, during the continuance of the rebellion, *whether the ordinary courts of justice shall or shall not at such times be open*, issue orders to all officers commanding Her Majesty's forces, and to all others whom he shall think fit to authorize, to take the most vigorous and effectual measures for suppressing the rebellion, and to punish all persons acting, aiding, or in any manner assisting in the rebellion, *according to martial law*, by death or otherwise. This evidently implies and assumes that it is according to martial law so to punish persons taken in rebellion. And it provides that this may be done in cases where, by the strict doctrines of the common law, martial law could not legally be proclaimed. Then there is this clause: "Be it *declared and enacted*, that nothing in this Act shall be construed to take away, abridge, or diminish the *acknowledged prerogative of Her Majesty for the public safety to resort to the exercise of martial law against open enemies or traitors*," which, if language has any meaning, is a *declaratory enactment* that there is such a prerogative in the land, or a solemn legislative *acknowledgment* of it, which, as Parliament is the guardian of constitutional liberty, must be of the very highest authority. It is not, as has been strangely suggested, a mere recital or reservation; it is a declara-

solemnly declared the contrary; and even the Imperial Parliament has again and again, in the most solemn and emphatic terms, declared and enacted that it was the undoubted prerogative of the Crown to declare and execute martial law for the suppression of rebellion, and for the summary punishment of those taken in open rebellion. And the terms of these declarations contain the best possible exposition, upon the authority of Parliament itself, of the true scope and character of martial law.

And, altogether independently of any strictly legal force and effect of these statutable declarations, and apart from any question of the bare legality of martial law, it may at all events be safely laid down, that these legislative declarations and enactments may be taken as expositions by the legislature of what is reasonable for the public safety under similar circumstances (*a*). For if such and such enact-

tory enactment, or solemn legislative declaration and acknowledgment. If it had ran thus, "That it is hereby declared and enacted that the Crown has such a prerogative," it could not have been more explicit; and such is, in effect, what is declared. So there is a similar declaratory enactment in a more recent Act, 3 & 4 Will. IV. c. 4: "Be it declared and enacted that nothing shall take away, abridge, or diminish the undoubted prerogative of the Crown for the public safety to resort to the exercise of martial law against open enemies and traitors."

(*a*) The spirit and substance of the various legislative provisions may thus be summed up and condensed: that wherever a rebellious spirit exists, and has either broken out into acts of open rebellion, or has been manifested by tumultuous movements, which have created such general alarm as materially to impede the due course of justice, and are inconsistent with the public peace and safety, and the ordinary means are found inadequate for their suppression, precautionary and protective measures should be taken; that there should be public proclamation that the disturbed district is to be deemed subject to that sort of repression which, for the want of any other name, if for no better reason, and because it must necessarily be carried out by military force, is called martial-law; that all overt acts in furtherance of and of rebellion, such as collecting and concealing arms or ammunition, exciting to secret associations or tumultuous assemblies, and, above all, any open acts of outrage, should be summarily dealt with before military tribunals; that these tribunals should be carefully constituted of officers of the regular army, so far as they can be obtained, and consist at least of three, and if possible of five; that there shall

ments have been again and again found and declared, by the wisdom of Parliament, right and proper, because necessary and expedient for the public safety and the preservation of peace in seasons of public disturbance, even in a country so near and so amply protected by military force; how much more reasonable may not such measures be deemed to be in periods of disaffection and rebellion, in distant dominions or dependencies far removed from the seat of Imperial Government and the sources of Imperial strength, and left with comparatively trifling military force for their protection. While, on the other hand, those calm and wise provisions of legislative wisdom may well be taken as models, and examples for imitation in those distant dependencies of the British Crown.

Moreover, there are statutable enactments (*a*) by the

be some officer or lawyer to attend such court, if possible, by way of judge-advocate or assessor; that the proceedings of these courts shall be under lawful control, and no sentence be valid unless confirmed by some superior officer; that no capital or corporal sentence be allowed to be inflicted except in certain cases carefully laid down beforehand, and, possibly, it might be safely laid down that there should be no capital sentence except in cases of murder and attempted murder, or unless the party has been actually taken in arms, and not in the latter case if there appears reason to believe that no actual violence has been committed, and that the party has yielded to compulsion or pressure; and that no corporal punishment be allowed except in certain cases, as arson, bodily outrage, &c. That no cases of mere seditious words be tried by courts-martial unless direct and clear incitement to, or accompanied by, or followed by the actual use of force or tumultuous assemblies; and that all the offences and penalties be assigned beforehand.

(*a*) Thus there are various Acts applicable to Ireland, under which a kind of modified martial law is allowed to be put in force when the state of the country, though not such as to justify martial law, is still such as to require extraordinary repressive measures, and the provisions of the Act plainly imply that in the mind of Parliament such measures are fully justifiable, *even* in a state of affairs which will *not* justify martial law, and, therefore, à multo fortiori, in a state of affairs which *does* justify martial law. Thus, a circular was lately issued to the Irish magistrates, in which their attention was directed to the following summary of their powers and duties under the Whiteboy Acts, the provisions of which will be found very valuable in the present circumstances:—"1. All persons armed with fire-

Imperial Legislature, with a view to the case of an apprehended rebellion, in one part of the United Kingdom, which are in spirit and principle equally, and, indeed, à multo fortiori, applicable to the case of an actual rebellion; and which at all events afford, by way of analogy, valuable guidance and authority as to what may be just, reasonable, or proper under martial law in any other part of the empire, especially with reference to the question whether the military or ordinary law is to be followed in regard to offences or penalties, or the nature of the offences which

arms or any other weapon, or appearing in any disguise, or wearing any unusual uniform or badge, or assuming any name or denomination not usually assumed by ordinary persons in their lawful occupations, who shall assemble, or who shall appear alone or with others, by day or night, are guilty of a high misdemeanour, subjecting them to penal servitude, imprisonment and whipping. 2. All persons who assemble and unlawfully compel, or by force or threats attempt to compel, anyone to quit his dwelling or employment, or who shall maliciously assault any dwelling-house, or who shall break into any house or outhouse, or cause any door to be opened by threats, or shall carry off any horse or mule, or any gun or other weapon, money, or other property, or shall by threats cause same to be given up to them, are equally guilty, and liable to the same punishment. 3. Any person who shall write, post, publish, or give any notice, letter, or message, exciting, or tending to excite, any riot or unlawful assembly, or combination, or threatening any violence to person or property, or demanding arms, ammunition, money, or other property, or requiring any person to quit any employment, is liable to the same punishment. 4. All persons aiding and abetting others in the commission of any of the above offences are equally guilty, and liable to the punishments above-mentioned. 5. All persons who by drum, horn, fire, shouting, or any signal, excite or promote, or attempt to excite or promote, such unlawful meetings, are also guilty of a high misdemeanour. 6. Any persons who, by force or threats, unlawfully impose on or tender to any person any oath or solemn engagement, are guilty of a grave misdemeanour, and are liable to whipping and imprisonment. 7. All magistrates and constables are empowered and bound to apprehend, disperse, and oppose all persons so engaged, and may call upon and command all persons who are not disabled by age or infirmity to assist them in so doing; and are fully indemnified for happening to kill, maim, or hurt any person in discharging such duty. 8. Any two magistrates having reasonable cause to suspect any person to be guilty of such unlawful rising, assembling, or appearing as above mentioned, or of having been at any such unlawful assembly, or of intending so to be, may and are required to summon before them any such person, and bind him

are to be deemed within the cognizance of the military under martial law. For the grand principle must be adhered to, in all its aspects and results, that, as Her Majesty is sovereign of an empire over which the sun never sets, and which includes within its sway subjects of every class and race, her great prerogative is to administer equal justice to them all, without distinction of colour or creed. And as, on the one hand, this principle requires that none of any class or race shall, on account of any such distinction, be exposed to severities to which others are not liable in like cases; so, on the other hand, severities which the wisdom of the Legislature has deemed salutary in certain cases in the United Kingdom, can scarcely be deemed excessive when applied in similar cases to other portions of the dominions of the Crown.

The statutes on the subject not only afford legislative recognition of the prerogative of the Crown, for the sake of the public safety, to declare martial law, but they likewise afford legislative recognition, indirect it may be, but not

over in his own recognisance to appear at the next assizes, and to be of good behaviour in the meantime; and in case of refusal such magistrates have power to commit such person to gaol. 9. Every magistrate has authority to summon any person within his jurisdiction whom he thinks capable of giving material evidence as to any such offence, and examine him or her on oath, and bind such person in recognisance to appear and give evidence, and on refusal to answer or to enter into recognisance, to commit such person to gaol." Now it will be observed, that under these provisions all such acts as are likely to lead to or have a tendency to cause a rebellion—all inchoate acts of rebellion—are severely punishable by penal servitude and flogging. This implies that the Legislature deemed the application of military law reasonable under such circumstances. If so, then, à multo fortiori, in a case of *actual rebellion*, such as would justify martial law and military authority. The above provisions, it must be borne in mind, apply *before* an actual rebellion, and, therefore, the jurisdiction is left in the civil magistracy. Assuming an actual rebellion justifying the declaration of martial law, then there is military authority, and, at all events, it is admitted that all measures that are necessary are lawful. And the above provisions are legislative declarations of measures which may be reasonably necessary even in the case of an *apprehended* rebellion, and, therefore, à multo fortiori, in an *actual* rebellion.

the less distinct, of what martial law really is, and what it involves. For having, on the one hand, affirmed the power of the Crown to declare it during actual rebellion, and given a power to declare it at times of apprehended rebellion, they proceed to provisions by way of restraint upon or regulations of its exercise, with reference to trials of rebels by court-martial, implying that such deterrent measures are a proper part of martial law, and that they would, unless so restrained and regulated, be under martial law absolute. And the nature of martial law has always, in accordance with the usage of the common law, and with these legislative recognitions, been thus defined, by our highest legal and constitutional authorities, as absolute military authority (*a*).

(*a*) Thus not only in *Tytler's Military Law* and *Maccarthur on Court-Martial* already quoted, is the nature of martial law thus defined, but it is equally so defined by the great commentator in the edition of his book, edited by a learned lawyer, and published about the period of the passing of these statutes. "Martial law is built upon no settled principle, but is entirely arbitrary in its decisions, and is in fact no law, but something rather indulged than allowed as law, a temporary excrescence bred out of the distemper of the state, and not any part of the permanent and perpetual laws of the kingdom. The *necessity for order and discipline* is the only thing which can give it countenance, and, therefore, it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the law of the land" (*Blackst. Comm.* vol. i., 419, edit. of 1800, edited by Christian). It is true that in a case decided *some years previously* the court said, "Martial law, as described by Blackstone (*i. e.*, as permanent and perpetual, and applying to *crimes which belonged to the civil courts*) does not exist in England. Where martial law is *established* and *prevails* in any county, it is of a totally different nature from that which is inaccurately called martial law, but which bears no affinity to that which was formerly attempted to be exercised in this kingdom, and was contrary to the constitution;" but that obviously alludes to the permanent establishment of martial law as attempted in the Commissions condemned by the Petition of Right for the *trial of all offences*, for, it is added: "Where martial law *prevails*, the authority under which it is exercised claims jurisdiction over military persons *in all circumstances*. Every species of offence is tried not by the civil judicature but court-martial (*Grant* v. *Gould*, 2 H. Blackst. 48). Of course that has been exploded, but it clearly implies that martial law, supposing it to exist, is absolute, and accordingly the passage is cited in *Maccarthur on Court-Martial*, as

In truth, the nature of martial law sufficiently defines itself, by the very principle upon which rests its legality, namely, its necessity (*a*). The prerogative of declaring it is simply, as has been seen, the right of the Crown to do its duty, in a great emergency—whether invasion or rebellion —for the protection of the realm, and for the public safety, and it follows that it must involve all that is necessary to meet the emergency and discharge the duty. It also follows from the very nature of an emergency, of which those only can judge who have to meet it, and to deal with it,

showing the distinction between military law and martial law, properly so called. And the same view of martial law is given by the great constitutional historian, in a passage at once asserting its legality and describing its nature. "There may, indeed, be times of pressing danger when the conservation of all demands the sacrifice of the legal rights of a few; there may be circumstances that not only justify but compel the temporary abandonment of constitutional power. It has been usual for all Governments during an actual rebellion to proclaim martial law, or the suspension of civil jurisdiction. And this anomaly is very far from being less indispensable at such unhappy seasons, in countries where the ordinary mode of proceeding is by jury, than where the right of decision resides in the judge. But it is of high importance to watch with extreme jealousy the disposition towards which most Governments are prone, to introduce too soon, to extend too far, to refrain too long, so perilous a remedy" (1 *Hallam's Const. Hist.*).

(*a*) Thus, the Duke of Wellington said, in the House of Lords (in reference to the Ceylon rebellion of 1849), "That martial law was neither more or less than the will of the General who commands the army; in fact, martial law is no law at all." And Earl Grey, on the same occasion, said, "that what the noble Duke had said with reference to what is the true nature of martial law, is exactly in accordance with the advice of Lord Cottenham, Lord Campbell, and the Attorney-General (Sir J. Jervis), who explained, that what is called proclaiming martial law, is no law at all, but merely for the sake of public safety, in circumstances of great emergency, setting aside all law, and acting under the military power." On the occasion of the Committee of Enquiry into the measures taken for the suppression of the rebellion in Ceylon, Sir D. Dundas was then Judge Advocate-General, and in his examination (see Q. 5421), distinctly laid down the doctrine stated in the text. The effect of the proclamation of martial law upon the inhabitants generally, is to put them all under martial law, and that is quite different from ordinary military law, which is written law found in the Mutiny Act and the Articles of War. But martial law, properly so called, is not written law; it is unwritten law; it arises upon necessity to be judged of by the Executive. "Martial law is a 'Lex non

that, subject to future censure by the Crown for any gross error or excess (always assuming an honest intention to meet the emergency and do no more), the authority of the executive or of the officers of the Crown entrusted with the exercise of martial law, must necessarily be absolute, in the sense that it is discretionary.

Martial law is, in short, the suspension of all law, but the will of the military Commanders trusted with its execution, to be exercised according to their judgment, and the exigencies of the moment, and the usages of the service;

Scripta,' it arises on a paramount necessity to be judged of by the Executive. Martial law comprises all persons. All are under it in the county or district in which it is proclaimed, whether they be civil or military. There is no regular practice laid down in any work on military law, as to how courts-martial are to be conducted, or power exercised under martial law; but, as a rule, I should say that it should approximate as near as possible to the regular forms and course of justice, and the usage of the service, and that it should be conducted with as much humanity as the occasion may allow, according to the conscience and good judgment of those entrusted with the execution (*vide* Ev. of Sir D. Dundas, Judge Advocate-General, before the Ceylon Committee, 1849-50). Sir J. W. Hogg, Chairman of the East India Company, said in the House of Commons, when an hon. member was inclined to carp at the statement of the Judge Advocate-General (Sir D. Dundas), that martial law was a denial of all law: "But the Judge-Advocate was quite correct; it was a denial of all law, and could not be the subject of regulation; when martial law was proclaimed, the commanding officer must use his discretion" (Parl. Deb. 1851, Ceylon). So the Judge Advocate-General, in answer to questions put by the Royal Commissioners for National Defences: "There is a broad distinction between martial law, called into existence by a proclamation of martial law, and the law administered by courts-martial for the ordinary government of the army, which for distinction and accuracy may be called military law. The latter, namely, military law, is applicable only to the army, and to such other persons connected with it as are made amenable to military law by express enactment. This law is partly written and partly unwritten. The written portion of it is comprised in the annual Mutiny Acts and the Articles of War issued under them, the provisions of which, like those of the ordinary law of the land, have been divulged and ascertained by a series of decisions given by competent authorities. The unwritten portion of it is founded on established usage, and is recognised by the legislature under the term, 'custom of war.' The former, namely, martial law, which is the subject of the present inquiry, is so arbitrary and uncertain in its nature, that the term 'law' cannot be

no fixed and settled rules or laws; no definite practice, and not bound even by the rules of ordinary military law (*a*). In the exercise of the powers conferred by martial law, it is conceived that there is an absolute discretion for the doing of anything which possibly could be deemed necessary or expedient, by the military authorities, for carrying out the object; the complete subjugation of the rebellion, the removal of the danger, and the restoration of peace and confidence. That is, not merely what a jury or any other tribunal might deem necessary, for it is a question purely

properly applied to it." "Martial law, according to the Duke of Wellington, it neither more nor less than the will of the General who commands the army. In fact, martial law means no law at all, therefore, the General who declares martial law, and commands that it should be carried into execution, is bound to lay down the rules, regulations, and limits, according to which his will is to be carried out. The effect of a proclamation of martial law, is a notice to the inhabitants that the Executive Government has taken upon itself the responsibility of suspending the jurisdiction of all the ordinary tribunals for the protection of life, person, and property, and has *authorised the military authorities to do whatever they think expedient for the public safety*" (Letters of Mr. Headlam, Judge Advocate-General, 25th Nov., 1859, cited in the Appendix to the Report of the Royal Commission on National Defences, p. 90).

(*a*) This passage is cited from the Author's *Treatise on Martial Law*, and it was quoted in the charge of Cockburn, C. J., in Nelson's case, with the omission, however, of the word "ordinary," and of any reference to the various passages cited by the Author in a note as authorities; and it was said by Cockburn, C. J., that "he *found no authority at all* for any such doctrines, which seemed to him as novel and unfounded as, in his judgment, they were mischievous, and, he had almost said, detestable." The only fitting comment upon this is to refer to the authorities already cited, uponw hich the above propositions were laid down. "Martial law is built upon no settled principles, but is entirely arbitrary in its decisions, and is in truth no law, but something indulged rather than allowed in law" (*Blackstone's Commentaries*, vol. 1, p. 419, ed. 1800, by Christian). So Hallam: "Martial law is the suspension of civil jurisdiction" (Const. Hist. vol. 1, p. 240). So *Blount's Law Dictionary*, ed. 1670; *Cowell's Law Dictionary*, ed. 1727; and *Tomline's Law Dictionary*, ed. 1835, all already cited. So the Duke of Wellington: "Martial law is no law at all." So Earl Grey, Lord Cottenham, Lord Campbell, Sir John Jervis (Attorney-General), Sir D. Dundas, and Mr. Headlam (Judge Advocates-General), as already quoted (*vide ante*, p. 141–2, in notes); and all declaring martial law to be a suspension of all ordinary law, and to be

military, to be decided at the moment, by military authority; and, therefore, it is anything which military authority may fairly deem necessary. Nor does it appear to make any difference whether martial law, as such, and by that name, is or is not allowed by law as part of the prerogative; as all allow that what is necessary is allowable, and the prerogative power itself is only rested on that ground.

As already observed, it appears to make no substantial or practical difference whether martial law, as such, and by that name, is or is not allowed to be legal as part of the prerogative, for the prerogative is rested only on necessity, and all admit that what is necessary is allowable, and martial law is only the law of war, or necessity, under military authority; and assuming a state of war de facto to exist, and to have been lawfully declared by the Crown or its representative, then it appears to follow necessarily, and there is strong ground for contending that it has already been established upon the highest judicial authority in this country, that it establishes a discretionary military authority (*a*), and at all events, practically and actually, as a mat-

absolute military authority, with no settled rules or practice, and, in fact, no law at all. These are the authorities (which it will be observed are entirely in harmony, and exhibit an unbroken tradition of legal and constitutional doctrine from the time of the Revolution to the present period) upon which the Author laid down the above proposition thus denounced by Cockburn, C. J., as "novel" and "detestable." It is unnecessary for the Author to add, that he entirely adheres to it, as *undoubted law*.

(*a*) This certainly was so determined by the case *Barwise* v. *Keppel*, Wilson's Reports, 317, and in the great case of *Sutton* v. *Johnstone*, in the House of Lords, 1 Term Reports, 548; and although it is quite true that in these cases the war was out of the Crown's dominions, yet, on the one hand, the proposition is broadly laid down, quite independently of that, that flagrante bello, the common law is silent, and, on the other hand, in a later case the proposition was cited and laid down in a case which arose in this country (*Warden* v. *Bailey*, 4 Taunton's Reports, 67). In the judgment in the House of Lords, the ground of decision undoubtedly is not that the matter arose out of the dominions of the Crown (which would have been no answer at all in an action between British subjects), but that it arose during a state of war, and in presence of the enemy. So again, undoubtedly, in these cases the question arose between military men, but it must be re-

ter of necessity it must do so; and if the war exists and is lawfully declared, it must lawfully be so. If so, then beyond all doubt it has been solemnly decided by the highest judicial tribunal—the House of Lords—that in the exercise of this military discretionary authority, the Commander is—as regards common law—absolute, although at the same time he is certainly not arbitrary; for though not responsible at common law, he is still responsible to the Crown, and subject to the more severe restraints of military subordination and military control, according to the laws and usages of the army.

membered that it is here assumed, having, it is conceived, been already demonstrated, that rebels engaged in war against the Crown are soldiers subject to martial law, as the law of war; a proposition which appears indeed to prove itself, for if it is not so, how can the measures of war be applied to them? Assuming that then the doctrine of the House of Lords legally applies (and in sound sense it surely ought to be applied, and of all war, that of rebellion is the worst and most dangerous, and its repression is the most important), that doctrine was thus laid down; that in a case where the articles did not define the duty, "There is no rule of the common or statute law applicable to the case, it is a mere military offence, it is the abuse of a military discretionary power, and the defendant must be tried for it by court-martial. If a man is charged with an offence against the Articles, or, where the Articles are silent, against the usages of the army, his guilt or innocence can only be tried by a court-martial. A Commander-in-Chief has a discretionary power by this military code to arrest, suspend, and put any man in the army upon his trial. A Commander who arrests or suspends a man without reasonable or probable cause is guilty of a military offence, but the same jurisdiction which tries the original charge must try the probable cause, which, in effect, is a new trial. And every reason which requires the original charge to be tried by a military jurisdiction, equally holds to try the probable cause by that jurisdiction. The salvation of the country depends upon the discipline of the army; without discipline they would be a rabble dangerous only to their friends, and harmless to the enemy. Commanders on a day of battle must act upon delicate suspicions; upon the evidence of their own eye, they must require instantaneous obedience. A military tribunal is capable of feeling for all these circumstances. But what condition will a Commander be in, if, upon the exercising of his authority, he is liable to be tried by a common law judicature? Not knowing the law, or the rules of evidence, no Commander will dare to act. Party prejudices mix, and if every trial is to be followed by an action, it is easy to see how endless the confusion, how infinite the mischief" (*Sutton* v. *Johnstone*, 1 Term Reports, 550). Now all this, of course, does not

But, at all events, a state of war de facto existing, and being lawfully declared by the authority of the Crown, or the representative of the Crown, it appears necessarily to follow, that what are proper means or measures of war—or, in other words, what is meant by martial law, and what it involves, must be matter for military authority, to determine according to the usages of the service and "the custom of war in like cases" (*a*). For the common law has no rules for war, and knows nothing of its rules, which is the meaning and reason of the legal maxim, "Inter arma,

apply if rebels engaged in war against the Crown are not liable to be treated as soldiers; but if they are, then it does apply, and it applies à multo fortiori in case of rebellion, and if within the dominions of the Crown, for then the danger and the mischief are far greater than when the war is distant. And again, if all this applies even to an action, how much more does it apply to a criminal proceeding, in which "it is certain that no man can be criminally liable for error of judgment" (Lord Chief Justice de Grey; *Mellor* v. *Scares*, 2 W. Blackstone's Reports, 1144). If it were otherwise it would come to this, that a man would be called upon to act upon one law, and would then be liable to be tried by another, and by courts which, confessedly know nothing of the law under which he acted, namely, the law of war.

(*a*) The proposition here laid down appears to follow necessarily from undoubted legal principle, and to be supported by a great weight of judicial authority. In point of principle nothing is more clear than that every matter not of law must be matter of fact, and therefore of evidence, and that nothing can be matter of law which is not matter of judicial cognizance. Now at common law the courts know nothing except of the common law and statute; hence it is that they require evidence of foreign law, and so of military law, except only the Articles of War, which by statute they are to take judicial notice of. Thus it has often been held that they know nothing even of the regulations for the army, still less of its usages and customs. And so in all the cases it has been held. Thus, in *Barwise* v. *Keppel*, 2 Wilson's Reports, 317, where the question was as to the right of a commanding officer going beyond and in excess of the sentence of court-martial, it was found and stated as matter of fact that it was in war and in presence of the enemy, and that it "is generally and universally understood in the army" that he had such and such authority, and that by "the constant custom and practice of the army" he had that power. And the court in their judgment said that, flagrante bello, by the Mutiny Act the king's power to make Articles of War was confined to his own dominions; when his army is out of his dominions, he acts by virtue of his prerogative, and therefore you cannot argue upon them, for they are both to be laid out

silent leges." And in every case where the matter is not one of judicial cognizance, it is necessarily matter of evidence—as, for instance, when foreign law comes in question—which is a very near analogy, and which is always dealt with on a trial, as a matter of fact to be proved. And as this appears to follow necessarily and logically from acknowledged legal principle, so, on the other hand, it appears to be supported by an overwhelming weight of judicial authority. Nor is it the less involved, virtually, in any theory which denies the legality of martial law on the

of the case, and, flagrante bello, the common law has never interfered with the army; inter arma silent leges." This latter is laid down as a distinct proposition, not dependent upon the other, and in a later case was applied to matters arising in this country, where there may be war as well as abroad (*Warden* v. *Bailey*, 4 Taunton's Reports, 69). But it was clearly laid down that where the Articles did not apply it was matter of usage; and that is the case in rebellion, for the Articles do not apply to civilians. In the case last quoted several cases are cited in which actions had lain for illegal acts in time of peace, that is, for flogging persons not under military law, or with gross and cruel excess (as 1000 lashes), or without the shadow of a pretext (a mere private letter), or without a court-martial and in excess of the usage and custom of the army. But those were mostly cases under regular military law, of which the courts take judicial cognizance, and in the only case which was not so provided for, the court took evidence of the usage of the army. So, in *Johnstone* v. *Sutton*, 1 Term Reports, 549, the same principle is laid down. So, in *Bradley* v. *Arthur*, 4 Barnwall and Cresswell's Reports, 292, where evidence of military men was taken on a question not solved by the Articles of War, as to the understanding or usage which prevailed in the army, and what the office of a superintendent of a settlement implied, and whether the Commander of the forces in Jamaica had the right to appoint a military Commandant of a settlement, and so forth; and the court said, "The Mutiny Act and Articles of War contain nothing on the subject; the book of regulations for the government of the army is not a book of which we can take judicial cognizance. We are required to take judicial cognizance of the Articles of War, but we are not required to take judicial notice of any other regulations, and, therefore, they must be brought before us by proof in the same manner as any other fact (p. 305). "If the Mutiny Act and Articles of War are silent, then we are bound to look at the usage upon the subject, because that usage may assist us in forming a judgment" (p. 307). It is nothing to say that there were cases between military men, for the principle is, that where the Articles are silent, usage is the test; and they are silent as to civilians in rebellion, while, on the other hand, it is here assumed (having, it is con-

ground of authority, and bases it only on necessity; for, after all, this practically resolves itself into the same question, since that may reasonably be deemed necessary which is usual in like cases.

At all events, assuming, what is admitted on all hands, that there is a power in the Crown or the executive, whether under the name of martial law or otherwise, to do all that is necessary for the occasion, that amounts in substance to a discretionary authority, for it is an authority to do all that the executive, in their judgment, may deem necessary, and it follows that according to all the analogies of ordinary law they would not be liable at law for its honest exercise, nor except for an abuse of it. For it is a general principle that although even a Minister of State is legally liable (*a*)

ceived, been already demonstrated) that they are liable to the laws of war, whatever they are. What they are, it is conceived, is matter of evidence. It is well established in our courts again, that when what is reasonable depends on experience in a particular business or profession, evidence of persons of experience therein is admissible, so that on the issue of necessity the question would be in substance the same. "The point to be determined is not whether the defendant arrived at a correct conclusion, but whether the occasion in question be exercised is reasonable judgment. This is a question of fact, the decision of which appears to rest upon this further inquiry, whether other persons exercising the same profession, and being men of experience, would or would not have come to the same conclusion" (Lord Chief Justice Tindal; *Chapman* v. *Walton*, 10 Bingham's Report, 63). Accordingly, in all cases involving military questions—not turning on the Articles—such evidence has been received. It appears to follow from these premises that the opinion of military men of experience and eminence as to what is martial law, and especially, for example, the opinion of such a man as the Duke of Wellington, is, if not decisive of the question, at all events worth that of all the lawyers in the world.

(*a*) Thus it was long ago held that a Secretary of State (in time of peace) has no jurisdiction to grant a warrant to break open doors to search for libellous papers; and such a warrant is illegal and void (*Entick* v. *Carrington*, 2 Wils. 275). And so he was legally liable, that is, because under no circumstances could he (in ordinary times and according to ordinary law) do such an act. But it is otherwise where there is a discretionary authority; in such case there is an immunity except for abuse. A justice of the peace is authorised to require sureties of the peace for a limited term, according to his discretion, and need not bind the party over to the next

for an act in excess of his authority, as where, in ordinary times, he does an act which, according to ordinary law, he could not do *at all*; yet, on the other hand, under ordinary law the meanest magistrate or officer of justice is protected, if he acts honestly in the exercise of a discretionary authority; otherwise it is obvious that there would be no safety in actions in the exercise of public functions, and no one would be willing to act on them, the result of which would be fatal to the great object of government, the public safety. And if this immunity attends the humblest officers of justice, how much more would it, in law, be deemed to attend the exercise by the executive of their high functions, from which all others derive their authority.

The general principle (*a*) upon which legal immunities

sessions only (*Willes* v. *Bridger*, 2 B. & A. 278). The court, therefore, refused to interfere with the discretion of magistrates in taking security for keeping the peace (*Rex* v. *Tregarthan*, 2 Nev. and M. 379), still more to punish him. There are numerous instances in which even under ordinary law magistrates exercise a discretionary power, as in holding to bail and the like; and it is believed that it may be laid down as a general principle that they are never liable except criminally for an abuse of such an authority. The general principle on which these legal immunities rests appears to apply to every case of a discretionary authority in peace or war, and thus it has been applied in case of war, to captures, and therefore no action will lie against a captor, even although the capture has been declared erroneous and illegal (*Le Caux* v. *Eden*, 2 Douglas's Reports, 601). That decision was put upon general principles applicable to captures by land, and it was said that if such actions were allowed no one would make captures, and the inconvenience would be intolerable. The principle, it is manifest, applies à fortiori to the higher authorities, and accordingly these very cases were cited in the Privy Council in the very case of martial law, a case in which it was held that no action lies for an act by military authority under martial law (*Elphinstone* v. *Bedrechaud*, 1 Knapp's Privy Council Cases).

(*a*) The general principle of law is to exempt from legal liability all acts of persons in authority within their jurisdiction, or within the scope of their office or duty. Thus, as the law has exempted jurors from the danger of incurring any punishment in respect of their verdict in criminal cases, it hath also freed the judges of all courts of record from all prosecutions whatever, except in the Parliament, for anything done by them

rest, viz., the public interest, which requires that those who are called upon compulsorily, by the obligations of public duty, to exercise functions more or less discretionary, and which it is for the interest of the public should be exercised freely, with a sense of perfect freedom and inde-

openly in court as judges; for *the authority of a Government cannot be maintained, unless the greatest credit be given to those who are so highly intrusted with the administration of public justice*, and it would be impossible for them to keep up in the people that submission to their judgments, *without which it is impossible to execute the laws with vigour and success*, if they should be continually exposed to prosecutions of those whose partiality to their own classes would induce to think themselves injured" (*Hawkins' Pleas of Crown*, B. 1, c. 72). Justices of the peace are not punishable *civilly* for acts done by them in their *judicial* capacity; but if they *abuse* their authority, they may be punished *criminally* at the suit of the King, by way of information, for regularly no man is liable even to an action for what he does as judge (*Hawkins' Pleas of Crown*, c. 8, s. 74). If he acts *maliciously*, indeed, without a charge or information, he is liable (*Morgan* v. *Hughes*, 2 T. R., 228). But they can only judge on the facts laid before them, and if those facts give them jurisdiction they are not liable (*Lowther* v. *Lord Radnor*, 8 East, 173). Even ordinary justices of the peace are not liable at law unless they act out of their jurisdiction, or maliciously. If the court-martial in time of peace put a man to death by martial law, both the judges and officers are guilty of murder; but where persons act by virtue of a commission, which if it were strictly regular would give them full authority, but happens to be defective only in some point of law, it seems that they are in no way criminal (*Hawkins' Pleas of Crown*, B. 1. c. 72; *Foster's Crown Law*, 257). They are not liable if they act *within* their jurisdiction, unless they act maliciously or corruptly, and then they are liable by criminal information. "This freedom from action and question at the suit of an individual, is given by the law to the judges, *not so much for their own sake, as for the sake of the public*, and for the *advancement of justice, that, being free from actions, they may be free in thought, and independent in judgment*, as all who are to administer justice ought to be. And it is not to be supposed beforehand, that those who are selected for the administration of justice, will make an ill use of the authority vested in them. Even inferior justices, and those not of record, cannot be called in question for any error in judgment, so long as they act within the bounds of their jurisdiction. Corruption is quite another matter, so also are neglect of duty and misconduct. For these I hope there is, and always will be, some due course of punishment by public prosecution" (Lord Tenterden, C. J., *Garnett* v. *Ferrand*, 626). "It is not to be expected that any person will act, at the peril of being harassed by a multiplicity of actions, and of having his reasons and motives weighed

pendence of judgment, without fear of legal liability for honest error, and which is applied by the law of England even in ordinary times, under ordinary law, for the protection of the meanest of its ministers, appears to apply, *à multo fortiori*, to those who exercise the highest functions of the State, the functions of supreme executive authority, upon which depend the safety of the State and the security of all the rest. And, accordingly, so it has been held.

These doctrines are so deeply rooted in legal principles, and so strongly based upon the solid ground of necessity,

and tried by juries, at the suit of individuals who may be dissatisfied with his verdict" (*ibid*). If when a charge is before a magistrate, he does not exceed his jurisdiction, he is not liable to action (*Mills* v. *Collett*, 6 Bing. 93). It is for him to judge as to the effect of the evidence and the course to be taken (*Cave* v. *Mountain*, 1 M. & G.), and it is no ground for holding them liable, that they form an erroneous judgment upon the facts proved before them, or as to what facts were proved, or as to the mode of proving. No action will lie against a magistrate for anything done by him in the discharge of his judicial duty, without proof of actual malice or ill-feeling, or bad motive (*Linford* v. *Fitzroy*, 13 Q. B. rep. 230). Now it would seem unreasonable that the humblest ministers of justice should have such immunity, and not the minister or governor from whom they derive their authority. It has been solemnly held by the Privy Council, in a case most fully and most learnedly argued, that an act done flagrante bello, or even non dum cessante bello, by a military commander or any officer of Government holding a territory under a state of war, cannot be the subject of prosecution in a municipal tribunal under ordinary law (*Elphinstone* v. *Bedreehaud*, 1 Knapp's Privy Counsel Cases, 360). And that case had so near an analogy to that of martial law, that the authorities on that subject were brought before the court on the argument. The case arose in a conquered territory, and it was urged that as the inhabitants had been admitted to British protection they were entitled to the rights of British subjects. And the whole argument turned upon this, that it was a territory under military sway, notwithstanding that there were no actual hostilities going on, and that under such circumstances municipal courts of the country had no jurisdiction. And so the Privy Council held. There is a notion among lawyers who are not constitutional lawyers, that the remedy for every alleged wrong is recourse to a jury; but this, in cases of acts of Government, would lead to the reductio ad absurdum, that acts approved of by Parliament might be made subjects of punishment by the verdict of a jury. The true constitutional principle, it is conceived, is that acts of Government are the province of Parliament. It is a well-settled principle that a party cannot have a remedy at law for an act of State

that they are independent of forms of government or differences of political constitution, and, at least, wherever the principles of the common law of England prevail, as in the United States of America (*a*), these doctrines are fully recognised and firmly established. That is to say, that whatever is necessary to maintain the peace and order of society is lawful, and that a state of armed rebellion is a state of war, and justifies recourse to the measures and the laws of war, and that martial law is the law of necessity, or the law of war resorted to of necessity, and that,

(*Elphinstone* v. *Bedreechand*, 1 Knapp, 316), that is, for an act which the Minister of the Crown had legal power to do. The remedy (such as it is), is only against the Crown (*Buron* v. *Denman*, 2 Exch. rep. 184). That was an action by a foreigner against Captain Denman for seizure of his vessel under the order of the Governor of a colony, approved of by the Secretary of State, and it was held not to be maintainable because, having been adopted by the Government, it became an act of State (*ibid.*). There the act was not within the authority of the Governor, but it had been sanctioned afterwards by the Secretary of State, and it was held then to have become an act of State; and it was implied that if it had been within the authority of the Governor it would have been equally so. Thus also in the recent case of *Luby* v. *Lord Wodehouse*, in Ireland, the Court of Queen's Bench in Ireland summarily took off the file a declaration in an action against the Lord-Lieutenant for having the plaintiff arrested under a warrant issued under the Treason Felony Act, but which virtually gives a qualified power of acting under martial law without proclaiming it, the court holding that it was an act of State for which the Lord-Lieutenant could not be sued.

(*a*) In no country are these doctrines as to martial law more fully recognised or more fully expounded than in the United States, and that not only by military or legal writers, but by the highest constitutional authorities. Thus the great Chancellor Kent lays down that martial law is quite different from ordinary military law, that it is justified by paramount necessity, and proclaimed by a military chief (*Kent's Commentaries*, vol. i.). So all the Law Dictionaries. Thus: "Martial law is a system of rules for the government of an army, or allowed in time of actual war; an arbitrary kind of law or rule sometimes established in a place or district occupied or controlled by an armed force, by which the civil authorities and the ordinary administration of the law are either wholly suspended or subjected to military power" (*Burrell's Law Dictionary*, vol. ii., 708; New York, 1851). "Martial law is simply military authority exercised in accordance with the laws and usages of war" (Instructions to Army of United States, cited in *Bishop's Criminal Law*, s. 52). "Military jurisdic-

therefore, it is absolute power wielded by military authority, regulated by military usage, and subject only to military discipline, and governed only by the broad principles of justice, and not the formal rules of law. And while it is admitted that it may be a tyranny, it is justified as a temporary and necessary tyranny.

tion is of two kinds; first, that which is confirmed and defined by statute; second, that which is derived from the common law of war. Military offences under the statute law must be tried in the manner therein directed, but military offences which do not come within the statute must be tried and punished under the common law of war. The first is exercised by courts-martial, while cases which do not come within the Articles of War are of the jurisdiction conferred by statute or tried by military commission." "Military law must not be blended, as it sometimes has been, with martial law, which is an entirely different thing. Martial law, as Blackstone truly says, is in fact no law. It is an expedient resorted to in times of public danger similar in its effect to the appointment of a dictator. The general or other authority charged with the defence of a country proclaims martial law. By so doing he places himself above all law. He abrogates or suspends at his pleasure the operation of the laws of the land. He resorts to all measures, however repugnant to ordinary law, which he deems best calculated to secure the safety of the State in the imminent peril to which it is exposed" (*Bishop's Criminal Law*, s. 45). "Martial law being thus vague and uncertain, and measured only by the danger to be guarded against, it is only suited to those moments of extreme peril when the safety and even existence of a nation depends on the prompt adoption and unhesitating execution of measures of the most energetic character. The constitution of the United States has wisely and indeed necessarily permitted the proclamation of martial law in certain specified cases of public danger, when no other alternative is left to preserve the State from foreign invasion or domestic insurrection. But though it is said to be nearly the same as no law, and despotic, yet there is room for doubt whether this is so. It of course may suspend for the time the civil courts, but there seems to be no reason why the new courts should not consider themselves bound to govern themselves in their proceedings, as far as the nature of the case will admit, by established principles of justice. Nothing is plainer in principle than that neither military nor martial law is justified in running riot. The doctrines of right should in no emergency be violated, because no emergency can call for the commission of wrong. Emergencies may demand new methods and prompt movements in executing the right, but never the subversion of right and the execution of wrong" (*ibid*). This is in substance what our courts have laid down, that there ought to be the best inquiry the circumstances will admit of—a grave and honest inquiry. This is exactly in effect what the Author laid down

The unsound and untenable notion (*a*) which has been recently put forth in this country, even, upon high authority, that, in cases of emergency, the executive is to be left to a wholesale, wilful, violation of the law, on the ground of necessity, and that assuming martial law to be illegal, it must, nevertheless, be declared and exercised, trusting to a bill of indemnity, has never been recognised, but is wholly repudiated and even reprobated. It is broadly laid down that it is contrary to principle to recognise a right wilfully to violate the law, and that the true principle is, that if it is necessary it is lawful, and that the necessity for martial law involves its legality. That is, not that it is lawful at common law, for the common law knows of no necessity to inflict death except in conflict or in self-defence, but that common law recognises the lawfulness, in a state of war, of a law—the law of war—under which it is lawful.

Assuming that by the common law of England there is the power in the executive, either by virtue of a prerogative founded on necessity, or of the necessity on which the

in his book, that the courts-martial were bound by the principles and broad rules of justice, not the formal rules of law; and it is just what the Royal Commissioners laid down on the subject (*vide post*).

(*a*) "Whenever an act is necessary, in its legal sense of the word, it is, because it is necessary, lawful, and the rule of necessity furnishes the rule of law. Plainly, to commend an unlawful thing on the ground that it is necessary, is to confound not only all legal distinctions, but all moral ones also. Woe to our country if such gabble takes the place of legal doctrine" (*Bishop's Criminal Law*, p. 54). "The truth is, that martial law is the only kind of law which is adapted to those circumstances in which a reasonable military power will ask it to prevail, and no people or portion of people can exist even for a day without some kind of law governing them. If the civil tribunals, in the best of faith, endeavour to stretch their precedents, and adapt their processes to the emergencies which call for martial law, they so change the precedents which must govern afterwards, as to render the jurisprudence of the courts unfitted for times of peace" (*ibid*). These wise views were recently adopted by the Lord Chief Justice of England in his charge in the Nelson case (*vide ante*, p. 30). And it is to be observed that, as Chancellor Kent shows, all the States of America in substance adopted the common law of England, and hence American law books are authorities in our courts.

prerogative is grounded, to declare a state of war, arising from rebellion, and to take such means and measures as a state of war allow of, then, of course, in any foreign dominions (*a*), colony or dependency, even assuming the common law to be extended to it, there would be that power in the executive, even without express power conveying it on the ground of the very same necessity, making it a necessary incident of Government. And, accordingly, as in Ireland, where the common law of England prevails, this power of martial law has been recognised, regulated, and restrained by acts of the Imperial Legislature; so in India, the greatest of our foreign dominions, even in the Presidencies, where the common law has been more or less

(*a*) It is manifest, that if there has been a necessity in this country for martial law in an age when the mass of the population was in a condition of serfdom, and, therefore, in a state of constant disaffection, leading to insurrection, this necessity is still more likely to arise in foreign dominions, where the mass of the population are not only in that condition, but are often actuated, in a great degree, by the jealousy of different, if not hostile, races. Insurrections under such conditions are always the most dangerous (*vide Alison's Hist. Europe*, vol. 1, p. 65), and the disproportion of military force available for their suppression tends to augment the danger. With regard to the law prevailing as to English subjects, there is a loose notion, arising from a hearsay dictum (2 Peere Williams, 75), that British subjects carry with them the common law, at all events, into colonies or places they *first plant or settle;* but such cases are so rare, that it is hardly worth while to discuss the question of law, as to which, however, it will be found that this notion is untenable, and that the application of the common law of England to a colony always requires an Act of Extension (by the Home Government), or adoption (by the local State), and never can possibly exist otherwise, seeing that it is primarily local, and is the law and custom of *England.* This is the doctrine really laid down in *Campbell* v. *Hall*, Cowper's Reports (*vide post*, 157). Accordingly, in India, even in the Presidencies, the common law, so far as it prevails, even as to British-born subjects, does so entirely by charter (*Williams* v. *Jones*, 13 East's Reports, 439). And so, à fortiori, as to British subjects, alien in birth, it appears to depend entirely on charter; thus it was that it was taken for granted by the Privy Council that a contract between Hindoos in India was governed by the common law under the charter, if Hindoo law did not affect it (*Thachoorseydoss* v. *Dhondull*, 6 Moore's Privy Council Cases, 30). And so as to Canada, the laws of England have been, in part, applied there as they were in the United States (*Leonard Watson's Case*, 6

applied, this power has been recognised and restrained; and in other districts under British dominion, to which the common law has not applied, the exercise of this power in the Crown appears to be universally allowed.

Such being the result of the review of the common law or statute law of England with reference to the use or exercise of martial law for the suppression of rebellion, it may now be proper to consider its application to the colonies or foreign dominions and dependencies of the British Crown (*a*), in which, for obvious reasons, the sub-

Adolphus & Ellis's Reports; *Logan* v. *Mesurier*, 6 Moore's Privy Council Cases, 106). In India, even in the settled Presidencies, it has been assumed that martial law was allowable, and it has been regulated by local ordinance. In 1804, by Regulation X., the Government of India declared that it may be expedient, in certain cases, that the Governor-General should declare and establish martial law; and then it made provision for the regulation of its service. This was put in operation, and in 1817 was subjected to the comment and exposition of that sound lawyer, the late Serjeant Spankie, the Advocate-General of Bengal, and it is printed with his exposition in *Hough's Military Law*, ed. 1835. So in *MacArthur on Court-Martial*, and *Simmons on Court-Martial*, all books of received authority on the British army, martial law is described as absolute military power, applying to the whole of the inhabitants of the district. And apart from any special ordinances, it has been always assumed by the Indian Government that martial law was applicable to conquered or ceded territories, and its authority there has been affirmed by a decision of the Privy Counsel (*Elphinstone* v. *Bedreechand*, 1 Knapp's P. C. C.) as not subject to municipal law.

(*a*) There is some confusion on the question, owing to some looseness of expression in books, which can only be corrected by looking closely to judicial decisions. There is no doubt that in a conquered colony the Crown declares the law, until Parliament does so; but that, until the Crown or Parliament declares it, the old laws prevail. As to the other case of a colony settled by our subjects, there are some loose dicta about all the law of England prevailing there, which will be found, on examination, obviously erroneous, and the true principle in such cases is the principle of adoption. Thus, for instance, as to Jamaica, beyond all doubt it was a conquered colony, and so it was for the Crown to declare the law, and it did so declare it by royal charter. In a case which arose as to a cause of action (on a bond) arising in that colony, an English statute being pleaded—passed before the charter—it was upheld that it was a conquered colony, and that the inhabitants were governed by their own laws, to which it was rejoined that it was governed by the laws of England; and in argument this was held bad,

ject is of far more practical importance than it is likely ever to be in this country. And here the first question which arises is the law applicable to the colony or dependency, and whether it is different from that of this country, as to which the governing principle appears to be that the laws of a colony or foreign dependencies are either those which have been imposed by the Crown or Legislature of England, or those which it has adopted for itself, the general rule being that, for conquered colonies the Crown declares or imposes the law; and as to colonies settled by British subjects, they are at liberty to frame their laws, and as a rule usually, more or less, adopt those of England, always with more or less of modification.

because the Court said the laws of England did not take place, though the colony was conquered, until declared by the Crown; the Court apparently not being aware of the charter of Charles II. They threw out that in case of an uninhabited country, newly found out by British subjects, all laws in force in England are in force there; "so it seemed to be agreed;" but that, it is obvious, was obiter, and it is as obvious that it was erroneous (*Blankard* v. *Goldy*, 2 Salkeld's Reports, 411). In a later case, in which the action was for *the price of a negro sold* (in Virginia), it was held, in arrest of judgment (in the time of Chief Justice Holt), that so soon as a negro comes into England he becomes free—one may be a villein in England, but not a slave—and he added, that the plaintiff should have stated that the sale was in Virginia, and that by the laws of that country negroes are saleable, for the laws of England do not extend to Virginia: being a conquered country, their law is what the Crown pleases (*Smith* v. *Brown*, 2 Salkeld's Reports, 666). There is a passage in *Comyn's Digest*, tit. "Ley," in which it is stated broadly, "The common law is the inheritance of all the subjects of the realm," and, therefore, in the plantations and elsewhere, where colonies of English are settled, they are to be governed by the laws of England; and so, if a foreign territory not inhabited be obtained by the Crown of England, all laws in England bind there," for which the above case is cited. But this is only an illustration of the looseness of digests, for, as has been seen, there never was any such decision in that case, but it was a mere obiter dictum. And in another place in the same Digest, tit. "Navigation" (G. 3), it is said the laws of the plantations are the same by which they were governed before their conquest or accession to England, except where new laws are obtained since their conquest; and if new laws are given, then ancient customs, if not abolished, may remain, and, therefore, a new statute, made since their conquest, does not bind them, unless they be named, for which is cited a case in the 4th Modern Reports, 225. The

There is a loose notion (*a*) which cannot possibly, upon legal principle, be tenable, that there are colonies to which the common law of England extends, whether or not it has been applied to it. This notion is not tenable, because the common law is eminently local and is the custom of the realm. And the true principle appears to be that it must either be adopted or extended, as in this country, where the

notion that in a settled colony the common law of England necessarily prevails, cannot be tenable, for it is lex loci, it is defined as the "custom of the realm," and it requires some act of adoption or extension. The loose phrase that it is the inheritance of the English subjects will be found really to mean this, that they *have a right to adopt it*. For, otherwise, and if they had not, if they pleased, a right to reject it, or modify it, then they would not inherit the rights of British subjects. Hence, it will be found, on examination of the history of the American colonies, that they, in asserting that maxim, proceeded to *adopt* our law, as much of it as they pleased; and in *Kent's Commentaries* will be found mentioned their various acts of adoption. It is manifest that in colonies like Virginia or Jamaica, where slavery prevailed, it is impossible that our common law could have been bodily introduced or could have necessarily applied, and that its application, and the extent of its application, must have depended upon acts of adoption or extension. There was a charter of Charles II., "And we do further publish and declare that all children of any of our natural-born subjects of England to be borne in Jamaica shall, from their respective births, be reputed to be, and shall be, free denizens of England, and shall have the same privileges, to all intents and purposes, as our free-born subjects of England; and that all free persons shall have libertie, without interruption, to transport themselves and their families and their goods (except only coyne and bullion) from any of our dominions and territories to the said Island of Jamaica."

(*a*) Some strange misconception has recently arisen on this subject, and the question, whether the law of England prevails in a colony, as distinguished from any foreign law, has been confounded with the question, whether the common law of England in its fulness and entirety applies to the colony. Except by force of some statute this is actually impossible, for the very definition of our common law is the custom of the realm (2 *Inst.* 98). The prior and primary question always is, whether the law of England, whatever that may be applicable to a colony, prevails, or the law of the colony previous to our acquisition of it, supposing it not *planted* by us. Hence in *Campbell* v. *Hall*, Cowp. 208, it is laid down that the laws of a conquered colony continue in force until altered by the conqueror, but that the Crown may alter its law and constitution; but that in a colony acquired by title, the laws cannot be changed without the consent of Par-

common law could not have its course. The fundamental principle on the subject of the laws of our foreign colonies and dependencies being, that if conquered or ceded, they retain their own laws until altered, and if originally settled by subjects of this country, they either receive such laws as this country may impose, or make their own. In neither case can the common law of England apply to the colony except by force of some express law either local or Imperial. If the common law of England has been applied to a colony, as it is the custom of the realm of England,

liament. Of course the colony or dependency might receive the laws of England either by the Crown or Parliament, and thus Ireland received the common law. In other instances, as American colonies, the law was adopted, and not by the extension of the common law. In Jamaica—clearly a conquered colony—"the Crown, Lord Mansfield says, first appointed a Governor and council only, and afterwards granted a commission to the Governor to call an assembly." The constitution of every province immediately under the King has arisen in the same manner, not from grants but from commissions to call assemblies, and, therefore, that as at this time there were only English settlers on the island, it was at its first settlement a planted colony, from which, on the authority of Sir C. Yorke, he drew the conclusion that the Crown could not change the laws without the assent of the island assembly or Parliament." But that, it is obvious, left the question quite open, what were the laws of the colony, and he says not a word as to what they were, and does not suggest that they were the common laws and customs of England. On the contrary, it is clear that they could not be, but would be the laws imposed by the island legislature and the Acts of the British Parliament, and both these from the first recognised *slavery*, which has always been utterly hostile to English law, and, as a necessary consequence, recognised as a regular part of its system of government, the recourse to martial law on any *appearance* of public danger (stat. 33 Ch. II.), which, again, it has been seen, is utterly contrary to English law; and, in fact, where the institution of slavery exists, it must of necessity taint all the laws. But, in truth, what Lord Mansfield said, in the case cited as to Jamaica, which was entirely obiter, has been misunderstood, and clearly comprises what is here stated. He takes it as an admitted fact of history, that Jamaica was a conquered colony, but points out that afterwards, as a new settlement, it came to have a constitution, which gave the power of altering or settling the laws of the colony, so that the question practically is, what are its laws, according to the laws of the colony, and the usual rule applies that the *later* law prevails, and he lays it down as a general rule, "The law and legislative government of every dominion equally affects all persons and all properties within it, and the rule of deci-

it can only be by force of some statute, either of the colony or the Imperial Parliament, and in either case it is certain to be largely modified by local laws. So that the question practically is in each case, what is the law of the colony as a matter of fact.

The power of legislation in a colony upon this or any other subject depends upon the prior question, whether it is what is called a Crown colony or a conquered colony, originally governed by the Governor or King in council, or a constitutional colony to which, by charter or Act of Parliament, has been granted a legislative assembly, with power of legislation. In the case of a colony, however, originally a Crown colony, a constitution may be sub-

sion for all questions which arise there." And he goes on to show that when colonies have legislative assemblies they settle or alter the laws. And so on dicta to the like effect, as that of Lord Ellenborough, in *R.* v. *Bampton*, 10 Exch. Reports, 288, as to St. Domingo, for that was a case as to the validity of a marriage between British subjects there, and Lord Ellenborough says, "Considering it as marriage in a place where the law of England prevailed, we may suppose that the law of England, ecclesiastical and civil, was recognised by the subjects of England in a place occupied by the King's troops, who would impliedly carry that law with them," *i. e.*, the law as to the celebration of marriage between British subjects, so that a marriage celebrated there, according to the rules of this country, would be observed and recognised. The writer has lately with some surprise seen this cited as sustaining the stupendous proposition, that wherever English troops go they carry the whole common law of England with them; whereas what was meant was, that they might adopt the law of England, and if they did it was valid. A passage from *Clark's Colonial Law*, p. 7, is cited to show that in a colony acquired by occupancy the law of England then is immediately in force, which is evidently founded on the obiter dictum above cited, and is contrary to another proposition in the same work, that English statutes passed prior to the acquisition of the colony do not apply to it until afterwards applied by some act of legislation. In *Kent's Commentaries*, vol. i., p. 523, it is stated, that the common law, so far as applicable, was recognised and adopted by the constitutions of several States, and that, it is conceived, is the true principle; and though he adds, it was imported by our ancestors *so far as applicable*, and sanctioned by charters and colonial statutes, the qualifying words themselves imply an exercise of a power of selection and adaptation, and show that the real basis for the application of the common law of England in any other country is some act of extension or adoption.

sequently granted. But in any case the question is, what in fact have been the laws declared, or adopted, or extended? In the case of a Crown colony, which will have been a conquered or ceded colony, the question will be, what laws the Crown has declared or established by ordinance in council. In the case of a constitutional colony, the question will be, what laws have been adopted or framed by the Colonial Legislature. In the case of a colony originally a Crown colony, and then having a constitution, the question will be, first, what laws the Crown declared, and then what laws the colony adopted (*a*).

Our foreign dominions or dependencies, excluding that which has now become the Empire of India, but which

(*a*) Thus, in the case already cited, *Campbell* v. *Hall*, Cowper's Reports, 209–12, Lord Mansfield thus laid down the law generally: "No question but that the king has a right of legislative authority over a conquered country. In Jamaica, the king at first appointed a Governor and council only, and afterwards he granted a commission to the Governor to call an assembly. The constitution of every province immediately under the king has arisen in the same manner, not from grants but from commissions to call assemblies. In the year 1722, the Assembly being refractory, it was referred to Sir Ch. Yorke and Sir Clement Wearge to know what could be done, and they reported, "that if Jamaica was still to be considered as a conquered island, the king had a right to levy taxes upon the inhabitants; but if it was to be considered in the same light as the other colonies, no tax could be imposed upon the inhabitants but by an assembly of the island or by an Act of Parliament." On which Lord Mansfield observes, "They considered the distinction in law as clear, and an undisputable consequence of the island being in the one state or the other. Whether it remained a conquest or was made a colony, they did not examine." He then states his reasons for the latter opinion, and the real reason given appears to be, that the king had granted a commission to summon an assembly; for though he says something about Jamaica having become vacant and being resettled, he states that the Crown granted *a commission to call an assembly*, and that the *constitution of every colony has arisen in the same manner*, and he goes on to say, it arose as to Grenada, where the Crown granted a commission to convene an assembly, so that the legislation over the island might be exercised by an assembly with the consent of the Governor and council, instead of being vested in the Governor and council. And this, he says, irrevocably took from the Crown (subject of course to the legislation of the colony or Parliament) the power of legislation in council (*ibid*).

rather resembled a Crown colony on a large scale, being thus divided into constitutional colonies (*a*), in which the legislative power is in some sort of legislative assembly, and Crown colonies, in which it is in the Crown or Governor in Council, this does not appear in itself to make any difference in the executive powers and functions of Governors, which would appear to be dependent (except when affected by Imperial Legislature), upon the powers and prerogatives of the Crown at common law, and, subject to any local or Imperial legislation,—the present question of martial

(*a*) Our colonies, or, more correctly speaking, our dependencies, may be generally divided, as regards their political institutions, into three classes. 1. Dependencies possessing representative institutions under grant from the Crown, usually by commission, sometimes by order in council or charter. To this class belong Jamaica, and all the older British West India colonies, all the North American colonies (except Canada and Newfoundland), the Cape of Good Hope, and Malta. 2. Dependencies of which the constitution has been established by Act of Parliament. An Act of Parliament has been requisite in some cases to give representative institutions where former Acts or other obstacles stood in the way; in other cases, to establish Crown or nominated council where thought expedient. To the first division belong Canada, Newfoundland, the Australian colonies generally, and New Zealand; to the latter, Western Australia, the settlements on the West Coast of Africa, St. Helena, Hong Kong, the Falkland Islands, and the countries of the East India Company. 3. Dependencies (originally obtained by conquest) for which the Crown retains the power of legislation, and which are properly called "Crown Colonies." They are now these, Gibraltar, Heligoland, Labrador, Ceylon, Mauritius, Natal, British Kaffraria, Trinidad, St. Lucia, and perhaps British Guiana. Laws passed in those dependencies in which representative governments exist were called "Acts;" the laws passed in those in which it does not exist are called "Ordinances." Ordinances are simply confirmed or disallowed by the Crown, the pleasure of the Crown being signified by the Secretary of State. In every British dependency the personal authority of the Sovereign is represented and executed by the Governor, who is temporarily appointed by Royal Commission. He has the prerogative of summoning and dissolving legislative assemblies, of veto on all their bills, of reprieving and pardoning under certain restrictions, of suspending for misconduct all officers, civil, naval, and military, in his colony. He is ViceAdmiral within the limits of his government. He is also Captain-General and Commander-in-Chief in all colonies, except those in which the command of Her Majesty's forces may be specialy committed to a military officer of the rank of Colonel (*Kerr's Blackstone*, vol. i., p. 92). The Governors of

law, or measures for the suppression of rebellion, appears to resolve itself into the question already discussed as to the common law powers and prerogatives of the Crown for the suppression of rebellion.

The present question is, it is manifest, one which so entirely depends upon *necessity*, which overrides all positive laws, and, on the other hand, limits all general powers, that practically it would not probably be much affected either by the question, whether or not the common law applied to the colony (*a*), or by the question, whether or not there

all the colonies except two are aided in the discharge of their duties by an executive council" (*ibid*). The question, therefore, of the power of the Governor, as the Governor appears to possess all the prerogatives and powers of the Crown so far as necessary to carry on the government and perform the duties of government, the first of which is the maintenance of peace and order, appears to turn upon the powers and prerogatives of the Crown at common law. For so far as they are necessary to government, they do not appear to have been abridged, and the Governor of a colony could have no other or greater powers, while at the same time he must possess all those which are necessary to government.

(*a*) Some importance appears to have been attached to this in considering the present question; and, of course, assuming that the common law does apply, and that it forbids martial law in any emergency however terrible, and even in the last convulsions of a State, it is important; but then such a contention as that appears not only opposed to all authority, but to be absolute absurdity. And it has been admitted on all hands that the common law authorises all that is necessary. So that the question practically resolves itself, always and everywhere, into one of necessity for the declaration of martial law. As so much has been said about the Petition of Right, it may be observed here that as to a colony, that must be immaterial except as evidence of what the common law is; for it is simply declaratory of the common law, and only applies where the common law already applies; and therefore the prior question is, whether the common law applies; and if it does, it is quite immaterial to consider whether a law merely declaratory of it applies, except as showing what it is. On the other hand, if the common law does not apply, it is impossible that the Petition of Right can apply, especially as it is in terms confined, as the common law primarily is, to the realm of England. As already seen, the common law cannot apply to a colony without some act of assimilation, either by adoption or extension, as the case may be. For it is essentially local: it is the custom of the realm—it is the law of England. Assuming the common law to apply to a colony, then the Petition of Right is evidence of what it was; but as the common law may be altered

was any special law or ordinance on the subject in the particular colony. For, on the one hand, whether or not the common law does, as it is conceived it does, authorise martial law in time of rebellion, it at all events authorises, it is admitted, all that is necessary; and therefore martial law, if it be necessary, and of course if the common law did not apply, it is not likely that the law prevailing would allow of less; and, on the other hand, whatever may be the local law in the colony, it could not be considered by the Crown as authorising any measures which were not necessary.

But undoubtedly it has been assumed, both by colonial legislatures (*a*) and by the British Crown, that there was

by statutes, the common law, whatever it may be as to martial law, avails nothing against a local statute; for the great object of statutes is to alter the common law. On the other hand, if there be no local law upon the subject, since martial law is based on necessity, and on the great law of social self-defence, it is equally lawful, whether the common law applies or does not apply. But, in terms, the Petition applies to the Realm.

(*a*) Thus, for instance in Jamaica, not long after the Petition of Right, which declared the common law, and after the Royal proclamation to the inhabitants of that colony which applied that law to them: not long after this, an Act passed in Jamaica which plainly implies and assumes that at common law there was a power of declaring martial law in time of actual rebellion, and conferred a further power of declaring it in time of *apprehended* rebellion, only then properly limiting and restraining it. That was an Act of the 33rd Charles II., long since repealed, which contained the following provision:—"On every apprehension and appearance of any public danger or invasion, the Commander-in-Chief do forthwith call a council of war, and with their advice and consent cause and command the Articles of War to be proclaimed at Port Royal and St. Jago de la Vega, from which said publication the martial law is to be in force; and then it shall and may be lawful for the said Commander-in-Chief to command the persons of any of His Majesty's liege people, as also their negroes, horses, and cattle, for all such services as may be for the public defence, and to pull down houses, cut down timber, command ships and boats, and generally to act and do with all full power and authority, all such things as he and the said council of war shall think necessary and expedient for His Majesty's service and defence of the island." Another section says: "Nothing within this Act or any clause therein contained shall be deemed, construed, or understood to give any Captain-General or Commander-in-Chief any power or authority for the sending any person or persons off this

this power of declaring martial law in cases of imminent emergency and evident necessity; and it has also been assumed that, martial law, or the law of war, being, on the one hand, in its own nature necessarily and essentially absolute, and, on the other hand, only applicable in a state of war or actual rebellion; it is, therefore, necessary to provide by statute or express regulation, either for its application in a more or less mitigated form, in the case of apprehended rebellion, or to limit and restrain its exercise in the case of actual rebellion. In this country, as it has

island against their will, or to do any other act or thing contrary or repugnant unto the known laws of England or this island." This Act, it will be observed, speaks of the law martial as a law then known and understood, and as implying, in rebellion, the extension to the population at large of the laws and rules of war, usually applicable only to soldiers. And the Act proceeds to extend this to cases of apprehended rebellion, only providing that the statute shall not be deemed to authorise anything contrary to the law of England, which at that very time authorised this martial law in time of actual rebellion, according to the authority of *Prynne's Animadversions upon Coke's Fourth Institute,* in reference to a pardon issued to the mayor and citizens of Dublin on account of certain torts committed by them with the object of preserving the city of Dublin from certain rebels. Prynne says:—"Had the mayor and citizens of Dublin been military officers commissioned by the King to garrison and guard the city against rebels, their case had been stronger in point of law, there needing no pardon in such a case as that." And that this was law in Jamaica was clearly established a century ago. And in *Chalmer's Opinions,* p. 268, we find an opinion of the Attorney and Solicitor-General of England in 1757, in which, when a question was raised as to the effect of the proclamation of martial law in Jamaica in suspending the functions of the council, they said, "We have taken the same into our consideration, and are of opinion that there is no foundation for the notion of the council that the proclaiming of martial law suspends the execution of the legislative authority, which may and ought to continue to act as long as the public exigencies require; nor do we apprehend that by such proclamation of martial law the ordinary course of law and justice is suspended or stopped, any further than is absolutely necessary to answer the then military service of the public and the exigencies of the province"—which of course is quite clear. Then the 9th Vict., c. 35, authorised the Governor, with the advice of a council of war, to proclaim martial law for thirty days. This Act did not define what was meant by "martial law," which therefore must be taken in the sense defined by law, and in the Petition of Right, as "such sum-

not been required for some centuries, such acts have not been deemed necessary, as they have in the sister country, and in some of our foreign colonies or dependencies.

As regards any of these local acts, orders, or regulations (*a*), it is to be observed that while, on the one hand, as they give powers which would not be conferred by the common law, to declare martial law, in cases not of actual but apprehended rebellion, they are, like all other legislative Acts, confined in their operation within the restrictions imposed by statute; on the other hand, where they give in

mary justice as is used in armies in time of war." This Act recites (s. 96), "That the appearance of public danger by invasion or otherwise may sometimes make the imposition of martial law necessary; yet, as from experience of the mischief and calamities attending it, it must ever be considered as among the greatest of evils;" and enacts, "That it shall not in future be declared but by the opinion and advice of a council of war. And then (s. 97), that the Governor shall be authorised, with the advice of a council of war, in the event of disturbance or emergency of any kind, to declare any particular district or county under martial law; just as in the Irish Rebellion Act provision is made for the same end, so as to render martial law legal, although the whole course of law was not utterly stopped all over the country.

(*a*) Thus the Indian Regulation Act of 1811 recited that it was expedient in certain cases that the Governor-General in council should declare and establish martial law, for the safety of the British possessions, by the immediate punishment of persons owing allegiance to the British Government who may be taken in arms in open hostility to the Government, or in the actual commission of any overt act of rebellion, or the act of openly aiding and abetting the enemies of the Government within its territories, and enacting that the Governor-General shall have power to declare martial law in any district, and of directing, among other things, trial by court-martial of persons in such cases (*Hough's Military Law*, p. 350). So the Jamaica Act, 9 Vict. c. 35, s. 96, recites that the appearance of public danger, by invasion or otherwise, may sometimes make the imposition of martial law necessary; yet as from experience of the mischief and calamities attending it, it must ever be considered as among the greatest of evils; and then enacts that it shall not in future be declared or imposed but by the opinion and advice of a council of war; and that at the end of thirty days it shall ipso facto determine, unless continued by the advice of a council of war; and further, that the Governor shall be authorised, with the advice of a council of war, in the event of disturbance or emergency of any kind, to declare any particular district under martial

general words the power of declaring martial law, which will probably be done in terms framed in analogy to common law, and laying down the true principle, those general words will not probably enlarge the power as regards British subjects, in Crown colonies or otherwise, beyond the common law power; that is, beyond the power of declaring martial law in time not only of actual rebellion, but rebellion so formidable as to require the extraordinary power of martial law, and raise a real case of necessity.

On the same principle on which in this country the Crown could, and does by prerogative, issue commissions of lieutenancy, under which military force can be raised and embodied if necessary, for the suppression of rebellion, the Crown can, and does by prerogative, issue commissions of lieutenancy or vice-royalty to Governors of colonies, or foreign dependencies, which confer the power of government, and necessarily, as incident thereto, confer the power of issuing such commissions, and calling out such military force as may be necessary for the defence of the colony from invasion, insurrection, or rebellion, and as incidental thereto, of declaring and exercising, if necessary, martial law (*a*).

law. Now, this taken together, would not authorise martial law literally in any disturbance, nor authorise its continuance even within the thirty days beyond the necessity. For that would be construing a statute, in the nature of a penal statute, literally, beyond its evident scope and spirit, which would be plainly contrary to legal principle; and therefore martial law would only be justified by such a case of emergency as would justify it at common law; and it would be requisite to stop it so soon as the necessity ended. Thus the Royal Commissioners in the Jamaica case went very carefully into the case of necessity, although the terms of the Act, as to the declaration of martial law, had been strictly observed; and they, and the Secretary of State, arrived at the conclusion that the Governor had power, even within the thirty days, to determine the operation of martial law, or at all events its practical execution.

(*a*) Thus, in *Bradley* v. *Arthur*, 4 Barnwall and Cresswell's Reports, 309, the Court of Queen's Bench held, as matter of law, without calling for the commission to examine its terms, that a Governor of Jamaica could necessarily, by virtue of his commission, from its very nature, and without express terms, issue a commission of lieutenancy for the use of military

Indeed, in the colonies and foreign dominions or dependencies of the British Crown, there is special and permanent provision made by the legislature, which, according to the opinions of a sound commentator, in an approved text-book of military law, virtually authorises the application of martial law, whenever a rebellion paralyses the civil power. For there is an enactment that whenever the civil judicature is not in force, soldiers shall be amenable to courts-martial for crimes or offences for which they would in this country be triable by ordinary common law; and as soldiers are citizens, and no more liable to military law than any other class, except on the ground of necessity, there seems no reason in sound sense why, when the civil judicature is suspended by rebellion, such crimes should not be generally

force. In that case the Governor of Jamaica had issued a commission to an officer to command such of His Majesty's subjects as were armed, or might thereafter arm, for the defence of the settlers in the Bay of Honduras, a dependency of Jamaica. And the court said it was perfectly legal as a matter of law, necessarily from the very nature of a commission as Governor. "The Crown exercises its judgment as to the persons who, from time to time, shall have the command in particular places, and the person who under the Crown is entrusted with the care of a whole province, must, from time to time, say who shall exercise military command within any part of that district" (*Bradley* v. *Arthur*, 4 B. & C. 309). It was urged that the Crown had no power thus to grant the power to give commissions, but the court said, "That looking at the Articles of War, it appeared to be taken for granted that the Crown had this prerogative; and that not only the Crown itself, but also under certain circumstances the Governor may grant commissions and make appointments; and in many cases it must be essential and necessary that some person should be so appointed" (*ibid*). Now here, as the terms of the Governor's commission do not appear to have been required or referred to, this must have been held as a matter of abstract law, and a necessary incident of the power of government. And so it seems to be in principle, looking to the very object and origin of government, and the prerogative of the Crown, as already explained. And as upon this principle it is within the power of a Governor to issue commissions to raise and embody military force to defend the colony from invasion or rebellion, so, on the same principle it would be within his power to declare martial law if necessary, for the suppression of rebellion, or the defence of the colony, that being one of the prerogatives of the Crown, because necessary for those purposes; *i. e.*, *when* so necessary.

triable and punishable by military tribunals, at all events if connected with the rebellion. And this, which at all events is in accordance with the spirit and principle of the enactments alluded to, appears to be the principle upon which martial law is declared in a colony, and applied to all classes, at all events as to crimes committed in the rebellion; the principle being that men in arms in rebellion are soldiers, or liable by their own act to be treated as such (*a*).

Independently of the formal legality of martial law, and treating the question more generally as one of necessity,

(*a*) The 143rd Article of War, entitled "trial of civil offences by court-martial in places within our dominions beyond seas where there is no civil judicature." Any officer or soldier who may be serving in any place within our dominions beyond seas (except India) where there is no civil judicature in force by our appointment, or by our authority competent to try such offenders, and who shall be accused of treason or of any other civil offence, which, if committed in England, would be punishable by a court of ordinary criminal jurisdiction, and not by a court-martial, shall be tried by a general court-martial appointed by the officer commanding-in-chief in such place, and if found guilty shall be liable, in the case of an offence, which, if committed in England, would be capital, to suffer death, or such other punishment as shall be awarded; no such punishment to be carried into effect until confirmed by him. Now, in the first place, as to soldiers, this enactment would seem to apply where, although there is some civil judicature established, its jurisdiction is suspended by rebellion. And that is the view taken of it in *Simmons on Court-Martial*, 98, where he says, "Such a case arises on the proclamation of martial law" (*i. e.* as he doubtless means, on the state of things which alone allows of it), "for the jurisdiction of the courts of civil judicature being superseded, it is not in force, and consequently the jurisdiction of courts-martial arises over civil crimes committed by soldiers." Now this, be it observed, is just as opposed to the ordinary law in the case of a soldier as of a civilian. For the Mutiny Acts only apply to military offences, as mutiny, not rebellion or treason. And if these cases come under the enactment in question by reason of rebellion superseding the civil tribunals, then in the first place that makes it just as applicable in principle to civilians, and on the principle on which the proclamation of martial law at common law, either as to soldiers or civilians, is justifiable, so, as a man in arms against his Sovereign has always in law been deemed guilty of levying war, he is in law liable to be treated as a soldier, for it would be absurd to put the loyal soldier of the Crown in a worse position than a rebel. Hence, upon strict legal principles, Lord Brougham, in the case of Smith, in Demerara, laid it down that the proclamation of martial law renders every man (*i. e.* every rebel) liable to be

there is abundant ground for laying it down, not only upon legal principle but judicial authority (*a*), that the Governor of a colony, in a great emergency and in a season of imminent public peril, may safely resort to such measures as may be honestly and reasonably deemed necessary for the public safety; and whether, under the name of "martial law," or in the name of necessity, he may take all measures as are necessary for the repelling of invasion or the repression of insurrection; but then, as practically such measures must be the measures of war, whether measures

treated as a soldier; a proposition, however, which perhaps would be more accurate if it ran thus: that the taking arms against the Crown renders every man liable to be treated as a soldier, and, therefore, brings him under martial law (and, of course, those who got others to do so or aided them in their rebellion, would come virtually under the same rules); and this is the view taken by Simmons, who, citing that doctrine of Lord Brougham, says it brings the supposed rebels under the above enactment, and renders them liable to be tried by court-martial for rebellion; although at the same time the sentences—by virtue of that article—must be according to English law. And this does not seem in the least to depend upon any distinction between a Crown colony and any other, for a British subject, soldier, or civilian has in any of the Queen's dominions his rights as such, and the above enactment applies to any of the Queen's dominions.

(*a*) This was remarkably illustrated in the great case of *Mostyn* v. *Fabrigas*, Cowper's Reports, 173, which has been singularly misunderstood. It was an action against the Governor of Minorca; and he pleaded that the plaintiff was guilty of a riot and endeavouring to raise a mutiny among the inhabitants; but on the evidence it appeared that the Governor seized the plaintiff without any trial, and caused him to be imprisoned, without any reasonable or probable cause, or any of the matters alleged in the plea, or any act tending thereto; so that it was a mere act of wanton violence and oppression, and it must be taken that there was no riot and no mutiny, and no pretence or excuse for what took place. And the language used by Lord Mansfield plainly implies that his judgment turned upon that; and that if the plea had been proved, it would have been good in law. For the plaintiff's counsel said, "It is contended that the Governor governs as absolute sovereigns do. From whom does he derive this despotism? Not from the king; for the king has no such power, and, therefore, cannot delegate it to another. He did not sit either as a military or civil judge; he heard no accusation, he entered into no proof, but in direct violation to all laws, and in violation of the first principles of justice; he followed no rule but his own arbitrary will, and went out of his way to prosecute the innocent. If that be so, he is responsible for the injury he has done. He

of restraint or repression, they resolve themselves really into martial law, which is neither more nor less than the law of war.

The legality of martial law, assuming it to have been declared and exercised under an honest, that is a sincere and reasonable belief, of its necessity for the public safety, is established, at all events in a practical sense, and in the ultimate result, by virtue of known principles of law. For the only way in which the parties executing it can be rendered criminally responsible in such a case, even for

could no more imprison him for a year than he could torture him. And Lord Mansfield said, "If the justification had been proved, the court might have considered it a sufficient answer; and if the nature of the case would have allowed of it, might have adjudged that the raising of a mutiny was a good ground for such a summary proceeding." "I can conceive cases in time of war in which a Governor would be justified though he acted very arbitrarily, in which he could not be justified in time of peace. Suppose, during a siege, or upon an invasion of the island, the Governor should judge it proper to send an hundred of the inhabitants out of the island, from motives of real and general expediency; or, suppose upon a general suspicion, he should take up people as spies, upon proper circumstances, laid before the court, it would be very fit to see whether he had acted as the Governor of a garrison ought according to the circumstances of the case." To lay down that a Governor is accountable only to God and his own conscience, and that he is absolutely despotic, and can spoil and plunder, and affect Her Majesty's subjects in their liberty or property, with impunity, is a doctrine that cannot be maintained." The other passages in that celebrated judgment plainly imply that if rebellion had existed it would have been a defence. That too, be it observed, was an action, in which it is always a question of strict legal justification. It is not so in criminal proceedings. "It is certain no man ought to suffer criminally for an error in judgment" (Lord Chief Justice de Grey, *Mellor* v. *Scares*, 2 William, Blackstone's Reports, 1144), though the party may be liable in an action to make compensation (*ibid*). The case of *Sutherland* v. *Murray* (cited by the Court of Error in *Johnstone* v. *Sutton*, 1 T. R. 538), is, it was said, "strong to show that a person representing the king in all functions, civil and military, where the act complained of is expressly legal, shall answer for an abuse of his authority. There the defendant was Governor of Minorca and Vice-Admiral, and had maliciously, and without probable cause, suspended the plaintiff, who recovered large damages." There the act which caused the mischief was the Governor's own act, (2) it was in time of peace, (3) it was without reasonable cause, (4) it was wilful and malicious. Liability, under the circumstance of all these conditions, is far from involving liability

deaths inflicted, is by indictment for murder (*a*), on which the question, even in strict law, will be not the bare legality, or legal authority of martial law, but the colour of authority; and the honest belief in its existence, or, what

under conditions totally different, and, indeed, the opposite in every respect, and the judgment of the Lords rather goes to negative it. In an action, on a plea of justification, it is, of course, a question of strict legality; on an indictment for a felony, it is a question of malice or bad motive, which no doubt is sustained by showing wilful or careless illegality; and in ordinary times this might, in most cases, be presumed or implied from illegality. But in a criminal case it must be shown that there was a bad intention, and we find that well-known principle of the law expressly laid down in *Foster's Crown Law*, in which, after saying there must be malice either express or implied, he says, "I believe most, if not all, the cases which in our books are ranged under the head of implied malice, will, if carefully adverted to, be found to turn upon this single point, that the fact hath been attended with such circumstances as carry in them the plain indications of an heart regardless of social duty, and fatally bent upon mischief." Therefore, although in ordinary times, illegality which would support an action would probably support an indictment, if there were serious bodily injury or death, it would not necessarily be so in time of rebellion. If there is no rebellion, then illegality is presumed to be wilful, and wilful illegality goes to show bad intent. As in the case of *Wall* v. *Macnamara*, 1 Term Reports, 536, and the cases there cited. Governor Wall, the plaintiff in that case, was afterwards hanged for flogging a soldier to death, but there was no mutiny, and a *murderous* intent was proved; and the sentence was not death; and it was really a murder *under colour* of a sentence to flogging. So in a case cited by Heath, J. W., 4 Taunt. Reports, 70, where action was brought against the officers of the Devon Militia for inflicting 1,000 lashes, in consequence of the sentence of court-martial for a pretended mutinous act, which was not mutinous at all. In that case, Heath, J., said that if the man had died under the lash, all the members of the court-martial would have been liable to be hanged (*ibid.* 77). But these were cases of *illegal* punishment under ordinary law, and merely under colour of military authority. So in *Frye* v. *Ogle*, 4 McArthur on Court-Martial, p. 269, the plaintiff had been guilty of no offence at all (Laurence, J., 4 Taunt. 56). So in *Warden* v. *Bailey*, 4 Taunt. 60, where no mutinous expressions were heard, and no military offence committed; and it was in time of peace, and Laurence, J., expressly distinguished a case in time of war and in face of the enemy (*ibid*).

(*a*) On an indictment for murder, the question is not mere legality but felonious malice; and this is not proved by mere illegality, and at all events is negatived by proof of colour of authority, from which legality might honestly be inferred. There is no case put in the books as one of

would come to the same thing, an honest belief in its necessity. And even in civil actions, on principles already explained, there might be a legal justification on the ground of necessity, if not on the ground of the honest belief in it.

murder on account of the absence of authority, in which it was not to be inferred that the party was aware of the illegality. Thus in *Foster's Crown Law*, after saying there must be malice either express or implied, he says, "I believe most, if not all, the cases which in our books are ranged under the head of implied malice, will, if carefully adverted to, be found to turn upon this single point, that the fact hath been attended with such circumstances as carry in them the plain indications of an heart regardless of social duty, and fatally bent upon mischief." So in *East's Pleas of the Crown*, speaking of the responsibility of the judge who pronounces, and of the officer who executes, a sentence, that writer says:—"If the person who pronounced the sentence had no colour of authority at all, it is undoubtedly murder in him and in the person who *knowingly* executed such a sentence. But if there be but slight colour, and the judge acted bona fide, and under a belief, though mistaken, that he had competent jurisdiction, he could not, I think, be guilty of murder." The same principle has been followed in judicial decisions. This seems the meaning of Lord Chief Baron Macdonald in Governor Wall's case, which has been of late strangely perverted. It was a case (according to the evidence as believed by the jury) of an infliction of flogging (for a supposed mutiny), with such severity as to show that it was intended to cause death, which of course would be murder, for the sentence was not to death, and the intent was to cause death, so that there was guilty illegality and actual murder. Yet even in such a case as that the said Chief Baron laid it down, "When a well-intentioned officer is at a great distance from his native country, and it shall not appear that circumstances arise which may disturb and alarm the strongest mind, it were not proper that strictness and rigour should be required, where you find a real, true, and genuine intention of acting for the best for the sake of the public. He is not in a position for getting assistance and advice; and if in those circumstances he should be somewhat thrown off the balance of his understanding, and does not exceed greatly the line of his duty, allowance for such circumstances ought to be given to him. But, on the other hand, if he shall, by reason of his distance from control, *wanton* with his authority and command, it will be the duty of the law to control it and keep it within bounds" (28 St. Trials, 143). It is true it is laid down in *Russell on Crimes*, that if any person wilfully and illegally puts another person to death, that act is, primâ facie, murder unless it can be reduced either to manslaughter or excusable homicide, the proof of which lies upon the party who caused the death. But to reconcile this with the authorities, it must be supposed that the illegality is

The greatest judge (*a*) and the greatest statesmen, have equally laid it down, that the conduct of Governors or others in authority in distant colonies or dependencies, acting, not as private individuals, of their own mere motion,

wilful. So even in an action, in which the question is legality, the existence even of reasonable grounds for believing a necessity may amount to a justification. This was remarkably illustrated in the case of *Wall* v. *Macnamara*, cited 1 Term. rep. 536, an action against the Lieutenant-Governor of Senegambia, for imprisoning him for nine months at Gambia, in Africa. The justification was under the Mutiny Act for disobedience of orders (not in time of war), and the imprisonment was at first legal, but was aggravated by many circumstances of cruelty. Lord Mansfield said: "In trying the legality of acts done by military officers in the exercise of their duty, particularly beyond seas, where cases may occur without the possibility of application for proper advice, great latitude ought to be allowed, and they ought not to suffer for a slip of form, if their intention appears to have been upright. The principal inquiry to be made by a court of justice is, *how the heart stood*. And if there appears to be nothing wrong there, great latitude will be allowed for misapprehension or mistake. But, on the other hand, if the *heart is wrong*, if cruelty, malice, or oppression appears to have occasioned or aggravated the imprisonment, or other injury complained of, they shall not cover themselves with the thin veil of legal forms, nor escape under the cover of justification, the most technically regular, from the punishment which is due to so scandalous an abuse of public trust." Cockburn, C. J., in his charge in Nelson's case, said:—"Therefore, if you should be of opinion that this case is one in which the want of jurisdiction is either established, or is so far left a matter of question as that you think those who have exercised it ought to justify what they have done before a jury of their countrymen in an English court of justice, where every question will be carefully sifted, and the law carefully ascertained and determined upon the most mature judicial deliberation, then, I say, however sorry we may be that gentlemen who have intended to do their duty, and who believed themselves to have been acting under a valid authority, should be made amenable at the bar of a criminal court for the crime of murder; yet, if they have taken upon themselves to put a fellow-subject to death without lawful authority, they must be content to stand by the consequences of what they have done. If, in the exercise of an assumed power, they have, in putting this man to death, done that which the law will not justify them in doing, they must be amenable to the laws of their country." But this language, it will be seen, is studiously vague, and only meant that the bill should be found.

(*b*) Thus in Wall's case, Chief Baron Macdonald said: "The case seems to me to be of peculiar importance; for, on the one hand, as the Attorney-General has most liberally and most sensibly said, when a well-intentioned

but in the discharge of great public duties, and the exercise of the greatest of all public trusts, the trust of government, are to be protected, rather than prosecuted, if, acting honestly in the discharge of that duty, not with wilful illegality, but acting in the belief that they are acting according to law, or under a necessity which might fairly be considered to override all ordinary law, they inflict injuries on individuals.

At common law, Governors of colonies would practically be protected from civil or criminal liability in acts done

officer is at a great distance from his native country, having charge of a member of that country, and it shall so happen that circumstances arise which may alarm and disturb the strongest mind, it were not proper that strictness and rigour in forms and in matters of that sort should be required, where you find a real, true, and genuine intention of acting for the best for the sake of the public. You see they are in a situation distant from assistance and from advice; in these circumstances, if a man should be so much thrown off the balance of his understanding as not to conduct himself with the same care and attention that anyone in the county of Middlesex would be required to do, and does not exceed greatly the just and proper line of his duty, allowance for such circumstances ought unquestionably to be given to him" (p. 143, 28 St. Tr.). Language which exactly accords with that of Lord Mansfield, even in a case of civil action. The principle is the same in civil or criminal proceedings, except, indeed, that there is this great distinction, that in a civil proceeding, where there must be a strict legal justification, it rests on bare legality; whereas in a criminal proceeding there must be wilful illegality. The most illustrious statesmen, not less than the greatest lawyers, have laid down this principle. Thus there is a passage from Lord Erskine's speech in the proceedings against Stratton, reported in the State Trials, vol. 21, in which he says, quoting the words of Burke, "I am not ripe to pass sentence upon the gravest public bodies entrusted with magistracies of great weight and authority, and charged with the safety of their fellow-citizens, on the very same title that I am. I really think that for wise minds this is not judicious; for sober minds, not decent; for minds tinctured with humanity, not mild and merciful. Who can refuse his assent to such admirable, manly sentiments? What indeed can be so repugnant to humanity, sound policy, decency or justice, as to punish public men, acting in extremities not provided for by positive institution, without a corrupt motive proved, or even charged upon them. I repeat the words again, that every man's conscience may force him to follow me, without a corrupt motive proved, or even charged upon them" (p. 1279). Citted by Mr. Hannen.

honestly, even though erroneously, in the discharge of their duty, and it would appear that this immunity would extend to acts, such as the declaration of martial law, or the direction of military measures of war, in case of a great public emergency, such as rebellion or invasion. The statute for the trial of Colonial Governors or other officers, in the service of the Crown, in colonies or dependencies beyond seas (*a*), in entire accordance with the spirit and principle of the common law on the subject, assumes that they can only be criminally liable, either for acts in their official capacity,

(*a*) The 11 & 12 Will. III. c. 12, "An Act to punish Governors of plantations in this Kingdom, for crimes committed by them in the plantations," recites that due punishment is not provided for several crimes and offences committed out of the realm, whereof divers Governors or Commanders-in-Chief of plantations and colonies within Her Majesty's dominions beyond seas, have taken advantage, and have not been deterred from oppressing Her Majesty's subjects, within their respective governments and commands, nor from committing several other great crimes and offences, not deeming themselves punishable for the same here, nor accountable for such of their crimes and offences to any person within their respective governments and commands; and enacted, that any Governor or Commander-in-Chief of any plantation or colony, within Her Majesty's dominions beyond the seas, shall be guilty of oppressing any of Her Majesty's subjects within their respective governments or commands, or shall be guilty of any other crime or offence, contrary to the laws of the realm, or in force within their respective governments or commands; such oppressions, crimes, and offences, shall be enquired if heard and determined in Her Majesty's Court of King's Bench in England, or before such Commissioners and in such county of the realm as shall be assigned by Her Majesty's Commissioners, and that such punishment shall be inflicted for such offenders as are usually indicted for offences of like nature committed in England." The reason of this statute was, as is stated, the legal maxim that the trial of crime is local, and that a crime can only be tried in the country where it is committed (*Raphael* v. *Verelst*, 2 W. Blackstone's rep. 983), though it is otherwise of civil rights of action for personal injuries, which may be tried in England, though they arose abroad (*Mostyn* v. *Fabrigas*, Cowper's Reports). As Lord Mansfield observed in that case, the statute said nothing about actions, for that reason. It is restricted to acts of oppression, that is wilful oppression, such as similar acts in a justice of peace in this country, for which a criminal information would lie at the suit of the King, as for an offence against justice, and an abuse of a high office; for which no private action will lie, or to crimes committed in acts out of the scope of their

which can be called oppressive (*i. e.*, according to the ordinary tenor and meaning of terms, wilfully or culpably oppressive); or for crimes altogether out of the scope of their office; which, again, implies conscious criminality. And these statutes, the scope of which is only procedure and place of trial (for which reason they do not apply to actions), only affirm and follow out the common law upon the subject.

These statutes (*a*) undoubtedly imply and affirm that

office, for which indictment would lie in the colony, and hence the statute provides two modes of procedure, adapted to these two classes of offences: the one, the King's Bench, *i. e.*, by criminal information; the other, by indictment at the assizes or before any court of oyer and terminer, by general or special commission. But the Act applies only to crimes.

(*a*) The 42 Geo. III., c. 85, recites that persons holding and exercising public employment out of Great Britain often escape punishment for offences committed by them, for want of courts having sufficient jurisdiction, by reason of their departing from the country where such offences have been committed, and that such persons cannot be tried in Great Britain for such offences as the law now stands (*i. e.*, except under the prior Act which applied only to Governors and military Commanders), and enacted, that if any person who shall hold or exercise any public station or office out of Great Britain shall commit or be guilty of any crime, misdemeanour, or offence, in the execution, or under colour, or in the exercise of such station or office, every such crime, misdemeanour, or offence, may be prosecuted in the court of King's Bench in England, either upon an information exhibited by the Attorney-General, or upon an indictment found, in which the crime, offence, or misdemeanour may be laid or charged to have been committed in Middlesex, and all such persons shall, on conviction, be liable to such punishment as may, by any laws now in force or Acts that may be passed, be inflicted for *any such crime, misdemeanour, or offence,* committed in England, and shall also be liable, at the discretion of the court of King's Bench, to be adjudged to be incapable of serving the Crown in any other office or station, civil or military; and then the Act goes on to provide for the obtaining of evidence concerning the matters charged, by examination of witnesses abroad, and it also extends to actions against persons in such positions for false imprisonment, the provisions of the statute giving certain statutory protection to magistrates sued for such causes of action. The Act, it will be observed, is in pari materia with the other, and the purview of it is procedure only; it does not alter the law as to civil or criminal liability, and, as to the latter, it expressly provides that no punishment shall be inflicted save such as might be inflicted for any such crime, misdemeanour, or offence committed in

persons in such positions, may be guilty of "crimes, misdemeanours, or offences," in the execution or under colour or in the exercise of their station or office; but then they equally imply and affirm, from the very use of such terms, that there must in such case be wilful and culpable misconduct or oppression; and those terms are utterly inapplicable to acts done honestly, even though erroneously, in the discharge of their public duties and functions, least of all to their acts, in the exercise of those functions and discharge of those duties upon some great emergency, for the sake of the public safety. Such acts are as much within the scope of their duty, as the most ordinary acts in the exercise of their authority.

England against the common law or any subsequent statute. Now, at common law, a justice of the peace or magistrate is liable civilly for any act in ordinary times beyond his jurisdiction, *i. e.*, such an act as according to law he had no power to do under *any* circumstances, as in granting general warrants, and the same principle applies to ministers or Governors. But for any act within his jurisdiction, *i. e.*, which he might do under certain circumstances, he is not liable even civilly, though he act erroneously, as in adjudging a weapon to be a gun, or a military weapon, when it is not so (*Brittain* v. *Kinnard*, 1 Broderick & Bingham's Reports). It is to be observed, that upon this latter Act it has been held, that it did not apply to an ordinary felony, but only to any crime or offence in the execution or under colour of it (which was evidently read—being all one sentence—as if it were in execution, that is to say, under colour of the office), and therefore, that it did not apply to a felony in execution or pretended execution of the office (*Rex* v. *Shaw*, 5 Maule & Selwyn's Rep. 405). The reason of the thing, said Lord Ellenborough, would lead us à priori to conclude that the jurisdiction as to trial of felonies should be restrained to the local court. The object of the Act was in the same spirit as the Act of Will. III., to protect Her Majesty's subjects against the criminal and fraudulent acts committed by persons in public employments abroad in the exercise of their employments, and reach a class of public servants which the stat. of Will. III. did not reach, and to place them in pari delicto with Governors. It has no reference to felonies, in spirit or letter (*ibid*). From this it would seem to follow that the legislature never contemplated that a Governor could be guilty of felony in the course of the execution of his office, at all events, in its honest exercise. And it is to observed, that although an indictment lies against a public officer at common law for wilful breach of duty (*Rex* v. *Holland*, 5 Term Reports, 607), or for acts wrongfully done under colour of their office, or under pre-

But, at all events, if the Crown approves what has been done, even although there may have been some excess through error of judgment, for which the Governor and military Commander are held responsible; then, independently of the legality of the proclamation of martial law, and of all acts done under it by military orders, there will be, upon the principles that have always been laid down, a bill of indemnity (*a*), which will be a legal bar to

tence of acting in exercise of it (*Rex* v. *Dobbin*, 7 East's Rep. 218), and there may be a criminal information against a magistrate for acting corruptly (*Rex* v. *Blanchard*, 4 Law Journal (N.S.), Magistrates' cases, 241), yet there must be distinct evidence of the bad motive, and mere irregular or improper conduct, as acting without evidence, will not suffice (*ex parte Fentiman*, 2 Adolphus & Ellis's Reports, 127). It is only when the Act is void in toto that it subjects him to an action (*Groom* v. *Forester*, 5 M. & S. 314).

(*a*) Thus, in the case of Jamaica, there was a Royal Commission of Enquiry, reciting that it had been alleged that disturbances had broken out in the island, and had been suppressed, and the disturbances and suppression had been attended with great loss of life, and that excessive and unlawful severity had been used in the course of such suppression: and then it directed that full and impartial enquiry should be made into the origin, nature, and circumstances of the disturbances, and with respect to the measures adopted in the course of their suppression. And the Commissioners, having reported that the declaration of martial law was justified, but that it was continued too long, and that the punishments were excessive, a bill of indemnity was allowed: "That all personal actions and suits, indictments, informations, attachments, prosecutions, and proceedings, present or future whatsoever, against such authorities or officers, civil, military, or naval, or other persons acting as last aforesaid, for or by reason of any matter or thing commanded, ordered, directed, or done since the promulgation and publication of the proclamation of martial law aforesaid, whether done in any district in which martial law was proclaimed, or in any district in which martial law was not proclaimed, *in furtherance of martial law*, that is to say, on, from, and after the thirteenth day of October last past, and *during the continuance of such martial law, in order to suppress the said insurrection and rebellion*, and for the preservation of the public peace throughout the island, shall be discharged and made void. And that every person by whom such act, matter, or thing shall have been advised, commanded, ordered, directed, or done for *the purposes aforesaid*, on, from, and since the said thirteenth day of October, and during the existence of such martial law, shall be freed, acquitted, discharged, and indemnified, as well against the Queen's Most Gracious Majesty, her heirs

all actions or indictments for acts done honestly in the suppression of the rebellion. And thus, practically, the same result is arrived at in another way. But, upon the other hand, this would not preclude the Crown from pronouncing any censures upon the conduct of the Governor in proclaiming or declaring martial law, or the conduct of the Governor or military Commander in continuing or directing its execution, or for not properly controlling its execution.

Whether, therefore, by reason of formal legality or by reason of practical immunity; whether on the ground of a prerogative grounded on necessity, or of the necessity on which the prerogative is grounded, it would appear to be the duty of a Colonial Governor to take all necessary means and measures to suppress rebellion. Within the last few years an eminent and experienced statesman has, in

and successors, as against all and every persons or person whomsoever." But, upon the other hand, the Crown, while it affirmed the legality of all acts done under military orders under martial law within the district, and declared the bill of indemnity only necessary as to acts done without orders or beyond the district, censured the Governor for continuing martial law too long, and for not properly controlling its execution. The proclamation there was under a local Act, which allowed it for not longer than a month, and the proclamation declared that "martial law shall prevail; and that our military forces shall have all power of exercising the rights of belligerents against such of the inhabitants of the said county, except as aforesaid, as our said military forces may consider opposed to our Government and the well-being of our loving subjects." The Commissioners and the Crown were of opinion that under this proclamation martial law was rightly maintained for a month, but that its execution ought to have been controlled and restrained, and terminated when the rebellion was subdued. It is manifest, therefore, that the question resolves itself practically into one of the approval of the Crown as to the *control* and *continuance* of the measures of suppression, and that if the Crown approves there will be practical immunity. And although, no doubt, in the view of the Author and of the law advisers of the Crown on the case in question, the declaration of martial law carried with it legal immunity for all acts done under military orders, it is to be borne in mind, that practically there can be no actual immunity, no security against being vexed and harassed by prosecutions or actions, unless there is a bill of indemnity, which, no doubt, is meant when it is said that a bill of indemnity is necessary.

clear and emphatic terms (*a*), upheld the doctrine that it is the right and duty of a Colonial Governor, on the occasion of a rebellion of a race or class which threatens to be formidable, to declare martial law, and maintain and execute it, not only until actual insurrection or resistance has ceased, but until the *danger* is past, and until peace and confidence are restored. And on that occasion the most eminent lawyers, as well as the most experienced statesmen, concurred in entire approval of the conduct of the

(*a*) Lord Russell, whose name, it need not be added, is a guarantee for the maintenance of constitutional doctrine, and a sufficient answer to the nonsense which has been uttered on the subject, as if it were connected with "despotism." As if there were anything despotic in the exercise of the great right of social self-defence! In the case of Ceylon, the duty of a Colonial Governor under such circumstances was thus described by the experienced statesman at the head of the Government: "Be it observed that the news of that insurrection came suddenly upon the Governor. He immediately sent for an officer, to whose discretion and whose experience he might well trust. He acted according to that opinion. He immediately saw the General commanding the forces. He took means by which troops should be at once sent to the points at which the insurrection had broken out. He took other means by which the rebels might be promptly met and the rebellion promptly suppressed, and, in order to do that more effectually, with the concurrence of the General and the Queen's Advocate, he *proclaimed martial law in that district of the colony which was disturbed.* The effect was immediate and most salutary; because in a few days the armed resistance had ceased. But I must admit that it is a most serious resolution to come to, the establishment of martial law in any district or in any part of a colony. But the Governor had to consider that if, on the one hand, martial law cannot be continued without the risk of punishments which may reach not the most guilty, but those who have appeared in arms, and are guilty according to the law of high treason and rebellion; on the other hand, the consequence of refusing to continue martial law, even to put it in force, may be this, that rebellion may gain ahead; that insurrection, which at first is weak and may be easily crushed, may become formidable; that the whole order of the colony may be destroyed; that the allegiance which is due to the Crown may be withheld; that property to an indefinite extent may be spoiled and ruined; but, above all, that humanity, for the sake of which martial law was withheld, that humanity itself may be lost sight of, and many more lives may be lost in the struggle that may ensue than would have been lost if martial law had for a few weeks been continued." On that occasion it was objected, that mar-

Governor in declaring and exercising martial law for the suppression of the rebellion; and affirmed, on the one hand, its entire legality, and, on the other hand, its sound policy, with reference even to considerations of humanity. And as the view thus taken was arrived at with regard to such large considerations, and was based upon necessity, upon policy and humanity, it is obvious that it could not have had any reference to the mere circumstance that it was the case of a Crown colony; which, for reasons already suggested, seems to be quite immaterial; and which, at all

tial law had been continued for ten weeks, although the rebel force assembled at one time to attack were defeated, driven back, and dispersed. It was admitted that the Governor was not to blame for the step he had taken. But it was objected that he continued martial law. Lord Russell, however, replied that he acted in concert and with the advice of his Executive Council in this respect, and that there was a preponderance of opinion in the Council in favour of continuing martial law, and that the Major-General commanding the district, above all, was strenuous in advising that the operation of martial law should be continued. And Lord Russell vindicated this course, and said the Governor was right to take the deliberate advice of his Executive Council, of those who were best acquainted with the colony, and with their advice to continue martial law. Lord Russell in Parliament used the following language, which remarkably resembles those of Lord Mansfield already cited; and Lord Grey, Lord Cottenham, and Lord Campbell, supported the same view (*vide ante*). "In the last despatch which the Secretary for the Coolnies (Earl Grey) wrote, he stated that Her Majesty's Government still believed that the Governor was guided by opinions which he had conscientiously formed—supported as he was by those who ought to advise him in the colony—that in proclaiming martial law, and in punishing those who suffered, he was acting, as he believed, in the only way that could maintain the tranquillity of the country, and provide for the welfare of Her Majesty's subjects. That, sir, is our belief. It is our belief that when you send a Governor to a distant part of the globe—when you find that he is zealously performing his duty—when you find that he is endeavouring by all the means in his power to preserve the colony in allegiance to Her Majesty, and at the same time is consulting the peace, the welfare, the prosperity of such colony—we think that confidence ought to be held out to that Governor, that confidence ought to be placed in him, and that we ought not, as a Government, to attempt to throw any censure upon questions upon which we believe, if if there could be any difference of opinion, he is more likely to judge right from the circumstances before him, and the assistance of his advisers,

events, was not alluded to or relied upon by these eminent authorities as in any degree the ground of their decision.

Upon the principles here laid down, that is to say, either upon the ground of a prerogative in the Crown, arising out of necessity for the public safety; or, on the ground of that necessity, it would appear to be the right and duty of a Colonial Governor, in an emergency such as to raise a real case of necessity, arising out of a fearful and formidable danger, to declare the state of war, and use and exercise the means and measures of war, which, in reality, by whatever name it may be called, comes in substance to martial law. And as, whether it is put on the ground of prerogative arising from necessity, or on the ground of the necessity itself, it can make no practical difference in this respect, that in neither case can it properly be done, unless in a case of necessity, and in either case it can only be done under the authority of the executive, so it should seem that, on the same principle, it can make no substantial difference whether there is or is not any local act or ordinance allowing of it (*a*). For, on the

than we should be able who form our judgments of them at a distance. I believe we came to a right conclusion on that subject; and I believe that, looking at colonial government in general, this House ought to come to that conclusion. I believe that if at the first beginning of an insurrection a Governor were to say to himself, 'I must take care how I crush the rebellion; I must be careful how I punish the offenders; I may be brought before a Committee of the House of Commons; I may be censured by the Government under which I serve; I may undergo the pains and penalties of a resolution of the House of Commons, and, therefore, I must be careful not to extend the verge and boundary of strict law.' I believe if you teach such a lesson to your Governors, while you will diminish their energy—while you will diminish the security of Her Majesty's subjects in the colony, you will do nothing for humanity. On the contrary, whenever an insurrection springs up, you will have a long and bloody contest—you will have the lives of Her Majesty's troops sacrificed on the one hand, and you will have the lives and property of innocent colonists destroyed or endangered on the other; and, for my part, I must say I think it better that one guilty man should suffer, than ten innocent men should suffer death."

(*a*) The above is, no doubt, the ground of the following circular despatch

one hand, if there be, then, whatever be its terms, however loose or large, and whatever its effect as to bare legality, a Governor cannot escape responsibility to the Crown, if he put it in execution without an adequate necessity; and, on the other hand, even if there be no such act, he need not fear his responsibility to the Crown or to Parliament, if he do no more than may fairly, in the exercise of an honest, even if in some degree erroneous judgment, be deemed necessary and expedient for the public safety. If there be a local Act or ordinance, the Governor, even though it confers legality,

of Lord Carnarvon to the Colonial Governors, dated January 30th, 1867, on the subject of martial law, which was presented to both Houses of Parliament by command of Her Majesty:—"Sir,—Although I do not know that there exists in the colony under your government any law authorizing the proclamation of martial law by the Governor, I think it advisable to communicate to you, for your information, and, if necessary, for your guidance, an extract of a despatch addressed by me to the Governor of Antigua, in which I have stated the views of Her Majesty's Government on this subject. 'An enactment which purports to invest the Executive Government with a permanent power of suspending the ordinary law of the colony, of removing the known safeguards of life and property, and of legalizing in advance such measures as may be deemed conducive to the establishment of order by the military officer charged with the suppression of disturbances, is, I need hardly say, entirely at variance with the spirit of English law. If its existence can in any case be justified, it can only be because there exists such a state of established insecurity as renders it necessary for the safety and confidence of the well-disposed that, in times of national emergency, the Government should possess this extraordinary facility for the suppression of armed rebellion. But whatever apprehensions or disturbances may exist in any of Her Majesty's colonies, it is certain that no such chronic insecurity prevails in any of them, and in no colony therefore, should the power given by the present law to the Governor of Antigua be suffered to continue. I think it, therefore, necessary to repeat the instructions given by my predecessor, and to request that you will cause to be submitted to the Legislature an Act repealing so much of the law as authorizes the proclamation of martial law. I have only to add, that in giving you these instructions, Her Majesty's Government must not be supposed to convey an absolute prohibition of all recourse to martial law under the stress of great emergencies, and in anticipation of an Act of Indemnity. The justification, however, of such a step must rest on the pressure of the moment, *and the Governor cannot by any instructions be relieved from the obligation of deciding for himself, under that pressure, whether the responsibility of proclaiming martial law is or is not greater than*

will have to justify to the Crown the propriety of his conduct in carrying it out; and, on the other hand, if there be no such Act, then, whether or not the law confers legality, either because the common law allows martial law, or because it does not extend to the colony, the Governor, while equally having to justify his conduct to the Crown, will, if he has really acted under an honest and reasonable belief of necessity, be protected by a bill of indemnity.

It is manifest, therefore, that the question practically resolves itself into one of approval or disapproval by the

that of refraining from doing so.'" It is conceived, that in the last passage lies the real pith and meaning of the despatch, and that it is directed to the danger supposed to arise from the existence of an enactment absolute and unlimited in its terms. The terms of the Jamaica Act, for instance, were rather general: "That the Governor shall be authorized, with advice of a council of war, in the event of disturbance or emergency of any kind, to declare any district under martial law," and no doubt it was to enactments of this nature the above dispatch alluded. It will be noticed that it distinctly states the duty of the Governor to declare martial law *if necessary*, and though it speaks of "trusting to a bill of indemnity," it must not be supposed that it assumes the entire illegality of martial law, for then it would be opposed to all the authorities on the subject, including that of Cockburn, C. J., in his charge in the Jamaica case, who denounces the idea of wilful and wholesale illegality, and lays down (as the Author had done in his book) that it is only casual and incidental illegality which is the proper subject of a bill of indemnity, and this, no doubt, is what the despatch alludes to. In a recent debate upon the subject, the late Under Secretary for the Colonies was reported to have said, that, but for such an Act, martial law could not have been declared, and that there would have been no necessity for a Commission of Enquiry into its execution. But this was a double error, for the Lord Chief Justice said in his charge, that if ever there was a case for martial law that was the case, and according to the above despatch, and the opinion of the Commissioners and the Secretary of State, it would have justified its declaration without an Act; and, on the other hand, the existence of the Act did not prevent the Crown from issuing a Commission of Enquiry into the conduct of the Governor, and pronouncing upon its wisdom and propriety. And it is conceived that the existence or non-existence of such an Act makes, in substance, no difference; for if there be such an Act, the Governor will have to justify his conduct to the Crown, and if there be no such Act, and be such a case as requires measures of war, he need not fear that, on any view of the law, he will have an ample immunity, whether or not by bill of indemnity.

Crown, of the measures taken for the suppression of a rebellion. Assuming that, whether by virtue of the royal prerogative, grounded upon necessity for the public safety, and therefore vested in the Governor of a colony, as necessarily incident to the power of government, or by virtue of that necessity on which the prerogative is rested, there is any power, either at common law, or by any local act or ordinance, to declare the state of war, and exercise martial law, or take all the measures of war for the suppression of a rebellion; the circumstances under which such a measure would be justified have recently been laid down and described upon the very highest authority (*a*). The cir-

(*a*) Thus, in the recent case of Jamaica, which, from its having been the subject of enquiry by a Royal Commission, is valuable; the rebellion began by an insurrectionary outbreak, an armed attack upon the magistracy and troops, and an absolute massacre. While the volunteers were under arms at the Court house during the sittings of the court, the peasantry in a large body came into the town, first attacked a police-station, and took possession of the arms, the police at the time being at the Court-house. The mob then advanced to the Parade, where the volunteers were drawn up. The magistrate began to read the Riot Act, the mob advanced close to the volunteers, when the volunteers fired, and some of the mob were killed. Several gentlemen were killed, and others wounded. The Court-house, school-house, and the fort-house were burned down. The police force was disorganised. The prisoners in the district prison were liberated. The insurrection then spread in a different direction. The actual rising of the negro population took place at a different point of the island, and it rapidly extended from that point along the coast line of one end of the island for some fifty miles, until headed and turned by the landing of troops, and it was also at the same time spreading to the north-west, until checked by meeting the troops. Under these conditions, and knowing the insecure and unprotected state of the entire colony, and the small force available for our defence, in the event of any general rising taking place simultaneously, it was deemed a matter of absolute necessity and self-defence to proclaim martial law in the district where it existed and contiguous thereto. The council were unanimous in that view. And it is necessary to bear in mind that there were only 500 men engaged in quelling a rebellion in districts tenanted by a population of some 40,000, and comprising upwards of 500 square miles of country. Nor must it be forgotten that nearly the whole of the population, if not in actual rebellion, were sympathising with the rebels, and taking no steps to arrest its progress or aid the authorities. Under these circumstances, the Royal Commis-

cumstances appear to be these: either the actual occurrence of an outbreak, or, at all events, positive evidence of its imminence, and evidence of a planned resistance to lawful authority, with overt acts in preparation for such resistance; the existence of circumstances in the population, showing a certainty that the insurrection, if commenced, would be likely to spread with rapidity; a great deficiency of military power, and a great disparity between the forces on the side of loyalty and rebellion; an evident danger, in short, to the State, and a peril so sudden and so formidable as to amount, in a reasonable sense, to a *necessity*.

sioners reported, concerning the measures adopted for suppressing the insurrection: "With the full knowledge of all that has occurred, we are, nevertheless, of opinion that, upon the information before them, and with the knowledge they possessed of the state and circumstances of the island, the Council of War had good reason for the advice which they gave, and that the Governor was well justified in acting upon that advice." And they thus stated the ground of their judgment:—"1. That the disturbances in St. Thomas-in-the-East had their immediate origin in planned resistance to lawful authority. 2. That the causes leading to the determination to offer that resistance were manifold: that the principal object of the disturbers of order was the obtaining of land free from the payment of rent; and that some, moreover, were animated by feelings of hostility towards political and personal opponents, while not a few contemplated the attainment of their ends by the death or expulsion of the white inhabitants of the island. 3. That though the original design for the overthrow of constituted authority was confined to a small portion of the parish of St. Thomas-in-the-East, yet that the disorder, in fact, spread with singular rapidity over an extensive tract of country, and that such was the state of excitement prevailing in other parts of the island, that had more then a momentary success been obtained by the insurgents, their ultimate overthrow would have been attended with a still more fearful loss of life and property." The Commissioners thus expressed their general opinion upon the question: "We think that the greatest consideration is due to a Governor placed in the circumstances in which Governor Eyre was placed. The suddenness of the insurrection, the uncertainty of its possible extent, its avowed character as a contest of colour, the atrocities committed at its first outbreak, the great disparity of numbers between the white and the black populations, the real dangers and the vague alarms by which he was on every side surrounded, the inadequacy of the force at his command to secure the superiority in every district, the exaggerated statements which reached him continually

Whether the declaration of martial law be, by virtue of a local act or otherwise, strictly legal or not; it must be remembered that, as the declaration of martial law by the Governor of a colony is an act done by him in the execution of his office as a representative of the Crown, he is of course responsible to the Crown; and if upon his dispatches sufficient ground appears for censure, such censure may be pronounced; or, if not, and there are complaints made as to the execution of martial law, and the absence of a proper control over it, it is within the competence of the Crown to issue a commission of inquiry (*a*) as to the declaration and execution of martial law, and the measures

from distant parts of the island, the vicinity of Hayti, and the fact that a civil war was at the time going on in that country; all these circumstances tended to impress his mind with a conviction that the worst consequences were to be apprehended from the slightest appearance of indecision." And the Secretary of State wrote, "In the conclusions at which you have arrived, Her Majesty's Government generally concur, and they think that, looking at the singular rapidity with which disorder spread over an extensive tract of country, and to the state of excitement prevailing in other parts of the island, the ultimate defeat of the insurgents would have been attended with a still more fearful loss of life and property had they been permitted to obtain a more than momentary success." And he added, "As regards the proclamation of martial law under the Island Act of 1844, Her Majesty's Government agree with you that the Council of War had good reason for the advice which they gave, and the Governor was well justified in acting upon that advice." And the Lord Chief Justice of England stated that "if ever there was a case for martial law, this was that case" (*Charge*).

(*a*) The commissions of officers are held at pleasure, and the Sovereign, by his prerogative, has the right of appointing what is called a court of enquiry (*vide* Sir John Mordaunt's case, Sir John Mander's case, and Lord Torrington's case—*McArthur on Court-Martial*, vol. i. p. 109, in 4th Edition). And military law recognises all disorders and neglect which officers and soldiers may be guilty of, though not specified in the Articles of War (*Williams' Martial Law*, 148). In cases of this kind, the Commander-in-Chief may direct a court of enquiry instead of a court-martial; or the Secretary of State a commission of enquiry, which, instead of being the exercise of an act of severity, is very frequently an act of tenderness to the party (Dallas, C. J., *Home* v. *Lord Bentinck*, 2 Brod. & Bing. rep. 160). The proceeding is, therefore, in its very nature, a proceeding by the Commander-in-Chief (or Secretary of State), for the purpose of obtaining that information, which he is bound to obtain, as to the conduct of every officer

taken for suppression of the rebellion; and, on the report of the Commissioners, to take such further course as may appear proper.

Assuming that there has arisen such a rebellion as may constitute a case for the declaration of martial law, or for recourse to the means and measures of war, in order to its suppression, as that is a course to be taken by the Governor upon his responsibility, so he is the supreme authority in the colony, and is regarded as responsible for

holding a commission in the army, in furtherance of the exercise of his public duty, upon the result of such enquiry, whether the enquiry is to cease in the first instance, or whether it is to lead to any ulterior measure (*ibid*). The report is, in its nature, a confidential communication, in consequence of a direction by him, *for the information of his own conscience in the exercise of his public duty* (*ibid*, 163). It is on this principle that memorials to the Secretary of State are, although defamatory, if not wilfully and maliciously injurious, privileged or protected (*Farman* v. *Ives*, 5 B. & Ad. 642; *Blagg* v. *Stuart*, 10 Q. B. rep. 907; *Rex* v. *Baillie*, 21 Howell's State Trials, 1). The Secretary of State is the ordinary channel of communication between the Sovereign and the subject, and a memorial to the Secretary of State is virtually a communication to the Sovereign. Her Majesty can direct an enquiry into the conduct of any of her servants and ministers, and a memorial to the Secretary of State may be, in effect, a petition for such enquiry. Her Majesty cannot personally make the enquiry; and upon a petition to the Queen, she might direct it to be made (Lord Campbell, C. J., *Harrison* v. *Bush*, 5 Ellis & Blackburn's Reports). Thus, in the Jamaica case, the following commission was issued:—"Whereas, it is alleged that great disaffection hath prevailed in our said island, and that sundry evil-disposed persons have concerted the destruction of other our subjects resident therein; and whereas grievous disturbances have broken out in our said island, and have been suppressed, and the said disturbances and suppression have been attended with great loss of life, and it is alleged that excessive and unlawful severity has been used in the course of such suppression; and whereas it greatly concerns us that full and impartial inquiry should be made into the origin, nature, and circumstances of the said disturbance, and with respect to the measures adopted in the course of their suppression; and whereas it is requisite for the sufficiency of the said enquiry that it should be conducted by persons not having borne part in the government of our island during the existence of the said disturbances nor in the suppression thereof." And then the Commission appointed Commissioners for the purpose of making such enquiry: "And by all lawful ways and means to prosecute the enquiry, and to collect evidence in our said island respecting the origin, nature, and circumstances

general control over its execution or its duration (*a*); although, as the measures to be taken are military, and under military authority, their particular direction and regulation must be for the military Commander, and he is

of the said disturbances, and respecting the means adopted in the course of the suppression of the same, and respecting the conduct of those concerned in such disturbances or suppression; and we do require you to communicate to us, through one of the principal Secretaries of State, as well the said evidence as any opinions which you may think fit to express thereupon." And the commission, after sitting for some time in Jamaica, reported upon the nature of the disturbances, and how far they were rebellious, and of a nature to require martial law for their suppression, and also upon the nature of the measures taken under martial law, and on their duration and continuance. And they reported, in effect, that the declaration of martial law was justified, and its maintenance for the entire period (one month) for which it was proclaimed, although they thought that its execution ought to have been stopped earlier than it was. And as the statute only in general terms allowed martial law to be declared, leaving it to the Governor to exercise his discretion as to its duration and continuance, the report is equally applicable in all cases, and is therefore made the foundation of the following pages.

(*a*) On a recent occasion, the Secretary of State, in a dispatch already cited (*vide ante*, p. 12), acknowledged, "that, in the instruction to Colonial Governors, no reference is made to the possible occurrence of such an emergency as that in which he was placed." And he added, "How far it may be possible to frame general instructions which might assist the Governor in the case of future disturbances arising in any colony, is a subject which will receive careful consideration at the hands of Her Majesty's Government." But in a later despatch, already quoted (*vide ante*, p. 32), the Secretary of State declared that the Governor must exercise his own discretion without instructions: "The justification of a measure must rest on the pressure of the moment, and the Governor cannot, by any instructions, be relieved from the *obligation of deciding for himself under that pressure*, whether the responsibility of declaring martial law is or is not greater than that of refraining" (Despatch of Lord Carnarvon, cited p. 32). The difficulty and responsibility of the Governor's position may be exhibited by observing that the necessity for martial law, and the propriety of its execution or continuance depend mainly upon the deficiency or efficiency of the military force, and that again depends greatly on its disposition and distribution; and as to this, he has not *actual* control over the troops, but is liable to be embarrassed by differences between himself and the Commander-in-Chief. In the instructions to Colonial Governors, indeed, it is laid down, "That, as the supreme authority in each colony is entrusted to the Governor, it is not for him to determine the general nature of the opera-

left to exercise that control without any instructions, and acting entirely upon his own judgment and discretion, as to what may be necessary in the emergency.

The measures taken being necessarily military, whether

tions to be undertaken by Her Majesty's troops for the suppression of rebellion, and to order such steps as the safety and welfare of the colony may appear to him to require to be taken by the Commander of the forces; while it is the duty of the officer in command of the troops to obey such orders as he may receive from the Governor, and to adopt such military measures as may be best calculated to give effect to them." Nevertheless, when, ten days after the declaration of martial law, the Governor began to think of its discontinuance, and desired, with that view, to distribute the military, reinforcements having arrived, throughout the island, to "prevent rebellion breaking out, and render life and property safe, and give a feeling of confidence to the inhabitants," his directions were disregarded by the General, and thus all his plans were defeated (Desp. of Mr. Eyre, Oct. 26). The Commander-in-Chief was desirous of concentrating the troops and declaring martial law over the whole or greater part of the colony, and at the time when the Governor was thinking of discountenancing it, the Commander-in-Chief was pressing him to extend it (Desp. of Mr. Eyre, Nov. 3, 1865). The Governor, on the contrary, was for contracting and discontinuing the operation of martial law, and in order to enable him to do so he was for distributing the troops. And again, "My views are strongly adverse to the establishment of martial law in places in which, though excitement exists, and seditious language has been openly used, no actual outbreak had occurred (*ibid*). The policy by which I have been guided is desiring to occupy temporarily a number of parts which we had reason to fear might become the theatre of outrage. If this policy is continued for a little time, the country will be restored to its usual quietude" (*ibid*). But this policy was disapproved of and opposed by the Commander-in-Chief, and hence, about ten days before the discontinuance of martial law, the Governor wrote thus to the Secretary of State: "It certainly may happen, and I trust will, that no evil may result from the omission in this instance to act upon the Governor's instructions; but it is quite clear that the Executive can make no satisfactory or useful arrangements for the safety of the colony as a whole, if an officer at a distance is to be authorised by the General commanding, either to carry out the Governor's views or not as he may think expedient (Desp. of Governor Eyre, Nov. 4). It was in consequence of these disagreements the distribution of the reinforcements was postponed for two weeks after their arrival. And, therefore, martial law was kept up for those ten weeks; whereas, otherwise, it might have been dispensed with earlier. The importance of this consideration will be appreciated when it is observed that the Secretary of State thought that martial law might have been dispensed with from the time

in the field, or in the disposal of prisoners (*a*) by trial by court-martial, the particular direction of the measures must necessarily rest with the military Commanders. The theory of martial law, whether considered as the extension of military rule to the whole population, or as the exercise of the measures of necessity by military force, under military authority, involves the supremacy of military power and authority in the declared district under martial law, and therefore implies that the direct and primary responsibility must necessarily lie in the military Commanders, that is to

the reinforcements arrived; whereas, the point was as to their distribution, and martial law stopped the moment they were distributed. And the main reasons given by the Governor for maintaining martial law during those two weeks, were to *preserve peace and good order* in the districts where the rebellion had existed, and to overawe the ill-disposed, and thereby prevent any rising amongst the negro population of the districts where disaffection and seditious tendencies were known to exist. And these objects might have been attained by a distribution of the troops, after the arrival of the reinforcements, as the Governor desired. But, in point of fact, the Governor is liable to be thwarted and opposed by the Commander-in-Chief upon this vital point, and, in fact, he was so thwarted and opposed in the Jamaica case (*vide ante*, p. 190).

(*a*) As already seen, the theory of martial law, according to the highest authority, is that it is the will of the Commander, and any theory on the subject must ultimately come to that, for military measures can only be taken by military force and under military authority. Hence, they must necessarily be under military direction, and, as the military authority must be derived from the Commander-in-Chief of the colony, the orders—more or less general—must emanate from him. Hence, in the Jamaica case, the Commander-in-Chief delegated the command of the declared district to a field-officer, subject to himself, and that officer throughout reported to him. To that officer the Commander-in-Chief gave only *power*, having such reliance on his judgment that he did not deem it necessary to give him any directions, and that was, in itself, an exercise of his judgment as military Commander; and if any instructions had been deemed necessary, it was for him to issue them. In point of fact, that he regarded himself as retaining the supreme command was shown by this, that he did, when he deemed it necessary, issue orders and directions. Thus, on one occasion, when the Governor desired to give any general directions, he could only do so by way of suggestion to the Commander-in-Chief, who then gave effect to it. Thus, in the Jamaica case, the Governor, at the outset, gave the general directions that all rebels were to be cut off and captured (*vide* Ev. of Mr. Eyre). And then the Commander-in-Chief wrote to one of the

say, in the General in command of the district, subject to his superior, the Commander-in-Chief of the colony. It is, therefore, for them to give forth certain directions to the officers charged with the actual execution of the measures of martial law.

Subject to the Commander-in-Chief of the colony, it is for the General in actual command in the district, to issue such particular orders as he may deem necessary to carry out the general orders received from the Commander-in-Chief, and to see that those orders are carried out (*a*). And, although

officers in command of detachments: "I have instructed you to send out parties and capture any rebels they may discover, and I am much pleased by your adopting a more decided course with regard to captured rebels. The numbers you have sent into camp on charges, or suspicion, caused some embarrassment. One of two courses seems to me, under martial law, to be the rule for you to adopt. If, on careful investigation, the captured prisoners are innocent—always giving them the benefit of the doubt—then release them; but, if guilty, are taken red-handed, then summary justice and execution." Then there was a despatch written by the Governor to the Commander-in-Chief: "I am of opinion that all prisoners should, as rapidly as possible, be tried; and those who are not deserving of death, or flogging, be released; it is not desirable, with our overcrowded gaols, to sentence persons to imprisonment, nor would I advise that flogging be resorted to more than can be helped." The Commander-in-Chief then wrote to the General in command: "In furtherance of the opinion expressed by his Excellency, and in consequence of the large number of prisoners now at Up-Park Camp, I am to direct you to take pressing steps to dispose of these cases, either by courts-martial, or, where the charge is not of a serious nature, by the infliction of such amount of corporal punishment as you may deem the offence merits. Where evidence is wanting in support of a minor charge, release the prisoner with a caution."

(*a*) Thus, in the Jamaica case, the orders issued by the General in command showed an anxious desire to confine the acts of the military within the strictest limits of military discipline, and to take precautions against excesses or outrages by the soldiers, and some of these really are worth recording, and preserving as useful cautions for the future. *Vide* Colonel Nelson's order, October 20, to Lieutenant Adcock:—"All ringleaders to be secured; men *found in arms* to be summarily dealt with; minor punishments to be inflicted on the spot." So in his despatch, October 17:—"Captain Hole's proceedings were temperate, decided, and judicious; all rebels captured, having been tried, he had instantly executed." The context and the other despatches showed that by this was meant actual rebels, convicted of *active* participation in the rebellion; taken red handed,

in the excitement of an emergency, it may have happened that the orders first issued to the officers were necessarily general, and that more particular directions were only issued, as the necessity appeared to arise for them, on account of any errors committed or apprehended, and on the particular occasion may have been too late to prevent the occurrence of all excesses, yet, when once issued and recorded, they became useful as monitions or instructions against similar errors.

as the Commander-in-Chief expressed it. Order of General Nelson, 25th October :—"The officers commanding will respectively forbid any man to enter the house of any one, under any pretext whatever, unless accompanied by a commanding officer. Any man found doing so will be handed over to the Provost-Marshal, for summary punishment." On the other hand, the Brigadier-General, having received a complaint against the Provost-Marshal, near the termination of martial law, wrote the following :—"6th Nov. 1865. Memo. for the Provost-Marshal. The Provost-Marshal appeared to consider his powers more extensive than they are. He is simply entrusted with authority to inflict summary punishment on any individual whom he may detect in the commission of offences against order and discipline, and this is only to be exercised upon the commission of any particular offence which may call for an immediate example. No one knows better than myself the necessity, under past circumstances, for speedy action by the Provost-Marshal—these now are passed. I, therefore, peremptorily forbid any summary punishment being inflicted within the camp henceforth ; and all cases of serious nature are to be referred for my decision, or that of my A.D.C., to whom alone I shall delegate authority to dispose of such.—A. A. Nelson, Brigadier-General Commanding Field Forces, Morant Bay, 6th November, 1865." This letter was inserted by the Commissioners in their report. Thus, on the 2nd November, in his order to an officer who was to relieve a detachment :—"It will be necessary for you to exercise strict control over the men of your detachment, and not to permit any man to quit his quarters for the purpose of foraging, &c. You are not sent to your post for the purpose of punishing the negro, but to maintain order, and to afford protection to the inhabitants generally. You are not to inflict summary punishment if any supposed rioter be sent as prisoner to you ; be good enough to inquire into the case, and, if you consider the same as of a serious nature, send him to my head-quarters, with the evidence against him. You will doubtless have many prisoners brought before you, and may possibly through the animus of the inhabitants. Petty cases of larceny I cannot interfere with; they must hereafter be dealt with by the civil authority. I am quite aware you will be much pressed to administer punishment to supposed criminals, and you must be

As it is difficult, on the one hand, to frame regulations or instructions for the prevention of abuses or excesses, the occurrence of which is not foreseen or contemplated, and, on the other hand, difficult to prevent abuses and excesses on the part of forces engaged in a new and difficult service, in the midst of the excitement of a great emergency (*a*), it is obvious that it is of more importance to notice such orders and directions as have been issued on the occurrence of such abuses or excesses, with a view to prevent that recur-

firm, temperate, and judicious in all communications with civilians. You are not, on any account, to march out for the purpose of attacking anybody. The rebels, if reported in force, which I apprehend is quite impossible, must not be approached without my distinct order in writing. You will be pleased strictly to conform to the instructions herein, and any deviation therefrom will be a source of discomfort to yourself.—(Signed) A. A. Nelson, Brigadier-General Commanding Field Force." He had no particular instructions from the Commander-in-Chief, and he in the first instance issued none to the officers, who therefore were left at first entirely to their own discretion, although afterwards he issued some admirable orders, quoted with approval by the Commissioners. At the first, however, the officers were left without any definite instructions, and could only be guided by their own discretion and the usages of the service. This was evidently the view taken by the distinguished officer, the President of the Commission, for, in the examination of one of the officers, he put this as the governing question: "During the time your detachment was out, were they brought under control according to the usages of the service?" (Ev. of Lieut. Adcock.) That is, were they kept under orders, as for instance, in regard to firing, which should only be under orders, and so as to other matters. It appeared from this that, in the view of Sir H. Storks, the *usages of the service*, coupled with military orders, formed the only rule. And this, it is conceived, is the true view, and is to be found laid down in *Simmons on Court-Martial*.

(*a*) In the Jamaica case, the Governor wrote to the Secretary of State: "It must always be expected that during a time of active operations in the field, and especially when a country is under martial law, some few occurrences must take place which are to be regretted, and which are not accompanied by that strict formality which ought to be observed when practicable. Some cases of impropriety, and some acts of injustice, must always take place; but I trust it will be found that these have been as few as could reasonably have been hoped for, and have been unknown to, and unsanctioned by, those more immediately in command." And it turned out upon inquiry before Royal Commissioners, that this was so; and that as they were unknown to and unsanctioned by "those more immediately in com-

rence, and thus to profit by the experience so unhappily acquired. And there can be no doubt that the more particular are the orders or directions issued upon such an occasion, the more usefully will they operate in regulation and restraint of the execution of martial law, or of the measures of repression, which may be necessary.

It is manifest that, on such an occasion, the measures taken being under military authority, the Governor, the supreme ruler at a distance, can only be informed of them

mand," so they were à multo fortiori, unknown to and unsanctioned by the Governor himself, who of course could not be everywhere at the same time, who could only have general and more direct information of what was going on (the reports going to the Commander-in-Chief), and who was moreover overwhelmed by the cares of general government, and the anxieties and claims of the whole island. The Royal Commissioners, in the Jamaica case, held language very similar to that of the Governor: "We fear that this, to a great extent, must ever be the case when the ordinary laws, framed for the suppression of wrong doing, and the protection of the well-doer, are for a time suspended. The circumstances which are supposed to render necessary their suspension, are almost sure to be such as to excite both fear and passion; and some injustice, and we fear some cruelties, will be certain at such times to be perpetrated; but we think that much which is now lamented might have been avoided, if clear and precise instructions had been given for the regulation of the conduct of those engaged in the suppression, and every officer had been made to understand that he would be held responsible for the slightest departure from those instructions. It does not seem reasonable to send officers upon a very difficult and perfectly novel service, without any instructions, and to leave everything to their judgment. But as, under any circumstances, however carefully instructions may be prepared, and however implicitly obeyed, the evils of martial law must be very great, we are driven to consider whether martial law might not have been terminated at an earlier period than the expiration of the thirty days allowed by the statute." But it appeared to the Commissioners that it was most unfortunate that the officers were left so entirely without definite instructions, and so much to their own discretion; and their views were thus embodied and affirmed in the despatch of the Secretary of State on the subject:—"It appears to them (the Government), to be evident that, even in the first excitement of the disturbances, and still more at some later period, if martial law was allowed to continue, instructions ought to have been issued to the officers to whom the actual conduct of the operations was entrusted, which would have rendered such an abuse of power impossible. They agree entirely in the words which you have used, that 'much which is now lamented might have been avoided

by means of reports (*a*), which must follow their actual execution, and be reports of acts already done and measures already taken. And it is obvious, also, that the reports must take some time in reaching the Governor, and that some further time must intervene before he can be in a position to take action thereon; as the course to be pursued must necessarily depend upon circumstances to be considered with reference to the condition, not only of the

if clear and precise instructions had been given for the regulation of the officers, &c.'"

(*a*) The kind of measures taken and of information required on such an occasion, were alike indicated by Mr. Cardwell in one of his despatches to the Governor, in the case of Jamaica. "1. The number of persons tried, and of those sentenced by courts-martial, specifying the charge and sentence, and whether or not the sentence was executed, and under whose authority, and whether minutes were taken of the evidence on which the sentence was founded in each case; all minutes of evidence so taken to be appended to the return. The return should show also at what places and times respectively the offences were charged to have been committed, and the accused persons were arrested or captured and tried, specifying in each case whether the offence was committed before or during martial law, whether the arrest or capture was made during martial law, and in a place to which martial law extended; and if the person accused was arrested or captured in a place to which martial law did not extend, and removed to a place to which it did extend, there to be tried by martial law, and for an offence not committed during and under martial law, it should be stated by whose authority this was done, and whether under the advice of the Attorney-General of Jamaica. 2. Whether any persons were hanged, flogged, or otherwise punished without trial, and if so, by whom and under whose authority in each case, specifying the name, sex, colour, and quality of the person punished, the nature and date of the punishment, the nature and date of the offence, and the grounds on which it was assumed to have been committed. 3. The number of persons, so far as can be ascertained, who were shot in the field or in the bush, their names, sex, quality, and colour, and whether adults or children, specifying in all cases whether they were resisting or flying, whether armed or unarmed, and if armed, with what weapons, whether such as are used only for the purposes of offence, or such as are used also in agricultural or other peaceful occupations. 4. Whether any and what oral or written instructions were given to officers in command of detachments sent in pursuit of rebels, whereby they might know on what evidences or appearances, other than hostile action or attitude, they were to assume that those whom they might meet with were rebels; and whether those officers, or any of them, were led by their in-

district, but the whole colony, and especially on the sufficiency or distribution of military force, considerations bearing upon the important questions of the *continuance* of martial law and the Governor's responsibility for it.

The most important question, however, for the Governor, is one which is entirely for him, in his council, as representative of the Crown, and as the supreme civil authority in the colony; viz., as to the duration or continuance of martial law (*a*). And as there is, of course, no

structions, or otherwise, and without authority, induced to assume that all persons flying or hiding from pursuit, or all persons found with plunder, or all persons leaving their labour on plantations, were to be regarded as rebels and shot when met with. Copies of all written instructions should be furnished" (Despatch, Dec. 1). On that occasion the Secretary of State in his final despatch wrote, "With respect to the other measures of severity to which I have above referred, you have not imputed, and Her Majesty's Government do not impute, to Mr. Eyre any personal cognisance at the time of those measures; but they feel strongly that when a Governor has been compelled to proclaim martial law, it is his bounden duty to restrain within the narrowest possible limits the severities incident to that law, and for that purpose to keep himself constantly informed of what is taking place under it. In the first alarm of such a disturbance it cannot be expected that it will be possible for him to restrain all persons acting under martial law within the bounds which his own discretion would prescribe; but if it were deemed necessary to continue martial law, it was the duty of the Governor to inform himself of the character of the proceedings taken, and to put an end to all proceedings which were not absolutely necessary, and therefore justifiable on the ground of necessity."

(*a*) That war may endure long after actual hostilities, or that military sway may be necessary, and constitute a state of war justifying martial law, although actual hostilities have ceased, has been illustrated and established in a case decided by the Privy Council. There a territory had been conquered, and a Commissioner (Mr. Elphinstone), appointed by the Crown for its settlement, who appointed a military officer to act under him, with these instructions: "Until the neighbouring districts shall have been settled, endeavour to bring under your authority as much of the country as may be within your power. The first consideration, therefore, is to deprive the enemy of his resources, and in this, as in all other points, everything must be made subservient to the conduct of the war. All arrangements that interfere with that object must be reserved for times of greater tranquillity." When a village has once submitted, any practices in favour of the enemy must be punished as acts of rebellion by martial law. The Commander-in-Chief will be directed to assemble a court-martial for the

question as to the continuance of merely military measures, that is, military measures in the field, so long as there are any bodies of men in a posture of hostility or rebellion, this question, again, practically resolves itself into the nature of the measures taken, and especially as to *deterrent* measures. For, as to the *maintenance* of martial law merely *in terrorem*, for some short time after the cessation of actual hostilities or acts of open outrage, there would probably be no question, any more than as to measures purely military.

trial of such persons as you may think fit to bring before it, and to inflict capital punishment immediately on conviction. The same course must be adopted with regard to persons who shall conspire against our government, and likewise to all banditti who may assemble in the neighbourhood. I particularly call your attention to the necessity of inflicting prompt and severe punishment on persons of this description. Parties sent to plunder the country, are in all cases to be considered as freebooters, and either refused quarter or put to death after a summary inquiry, when there is no doubt of their guilt (*Elphinstone* v. *Bedreehaud*, 1 Knapp's Privy Council Cases, 320). And the lawfulness of all this was indirectly affirmed in that case by the Privy Council, although the particular question only related to the seizure of property, for the ground of decision was that the country was in a state of war, and under military authority. Thus, in the case already cited, it was distinctly stated that no actual hostilities were carried on in the neighbourhood, and the act in question was at a distance from the scene of actual hostilities. "The General (Sir Lionel Smith), stated that he was receiving reports as to the state of the country, and that whenever he received information that the enemy had means of re-assembling, he despatched troops to preserve the tranquillity of the country, and see that they did not re-assemble. He considered that he secured the tranquillity of the country, by sending the detachments, and that if he had not sent them, they would have been up again; they were subdued but not dispersed. He considered it to be necessary that the force should be very strong, to keep the tranquillity of the country; he considered it a necessary precaution to let everybody see that we had an overwhelming force, on account of there being a disaffected population." The General, as here stated, was Sir Lionel Smith, who afterwards became Governor of Jamaica, and the views he thus expressed, as to the proper course to be pursued in a country in a state of disaffection and disturbance, had a very remarkable resemblance to the policy of a successor of his, in the government of the same island, Mr. Eyre, who urged upon the Commander-in-Chief, with a view to avoid the necessity for continuance of martial law, and restore the country to a state of peace and confidence, which might enable him to dispense with it, the distribution of military force. (*Vide post.*)

The question, practically, would be as to the execution of martial law, and especially as to the deterrent measures pursued, and their duration.

As the execution of martial is only justified by necessity, and that necessity is measured by danger, and that danger by the *disparity* or *deficiency* of military force, it is manifest that the duration or continuance of martial law must mainly depend upon the sufficiency and disposition of military force (*a*). Martial law, indeed, is but the com-

(*a*) Thus, in the case of Jamaica, where, ten days after the declaration of martial law, the Governor began to think of providing for its discontinuance; the reinforcements being about to arrive, he desired with that view to distribute them throughout the island, in order thus to prevent rebellion breaking out, and render up the property safe and give a feeling of confidence to the inhabitants; his directions were disregarded by the General, and thus all his plans were defeated (Desp. of Mr. Eyre, Oct. 26). The Commander-in-Chief was desirous of concentrating the troops, and declaring martial law over the whole or greater part of the colony, and at the time when the Governor was thinking of discontinuing it, the Commander-in-Chief was pressing him to extend it (Desp. of Mr. Eyre, Nov. 3, 1865). The Governor, on the contrary, was for contracting and discontinuing the operation of martial law, and in order to enable him to do so, he was for distributing the troops; he wrote, "my own views are strongly adverse to the establishment of martial law in places in which, though excitement exists and seditious language has been openly used, no actual outbreak has occurred. If this policy is continued for a little time, the country will be restored to its usual quietude" (*ibid*). But this policy was disapproved of and opposed by the Commander in-Chief, and hence about ten days before the discontinuance of martial law, the Governor wrote thus to the Secretary of State: "It certainly may happen, and I trust will, that no evil may result from the omission in this instance to act upon the Governor's instructions; but it is quite clear that the executive can make no satisfactory or useful arrangements for the safety of the colony as a whole, if an officer at a distance is to be authorised by the General commanding either to carry out the Governor's views or not as he may think expedient, and without the Governor having any opportunity of knowing for a considerable period of time whether the arrangements he has directed have been acted upon or not (Desp. of Mr. Eyre, Nov. 4). There was every reason to believe that if the Governor had been allowed to have the distribution of the troops as he had desired, the duration of martial law might have been shortened. As it was, it was only continued a week after the reinforcements arrived; a period which was occupied by the discussions and arrangements for their distribution. As soon as they were distributed,

pensation for the weakness of military force, and the necessity for it ceases with the presence of an adequate military force, whence it is that it can hardly be necessary in this country. Hence it is that the question resolves itself practically into the sufficiency of military force to allow of such a distribution of it as to prevent danger and restore peace and confidence.

It has always been laid down (*a*), and has recently been recognized on very high authority—that of Royal Commis-

martial law was terminated. The Royal Commissioners took no notice of this most important consideration, which it is manifest is vital to the whole question. The Secretary of State did indeed advert to it, and though he concurred in the Report of the Royal Commissioners, that the execution of martial law had been kept up too long, he did not, nor did they, object to its continuance. It was rather to the number of executions under courts-martial that the objection was directed, and it was thought that the Governor should have restrained them. But it was not understood that he had, by distinct orders, restrained them, several days before the Commissioners thought they ought to have restrained them; he having sent a despatch to the Commander-in-Chief, desiring that the prisoners should be disposed of, releasing all but those guilty of the worst offences; and if this had been followed out, the executions must have been largely limited, and almost entirely put a stop to. And although it was said he ought to have known what was going on, it was overlooked that the reports did not go to him, and that he might fairly presume his orders were carried out.

(*a*) Thus, in the Jamaica case, the Royal Commissioners reported:—"But as under any circumstances, however carefully instructions may be prepared, and however implicitly obeyed, the evils of martial law must be very great, we are driven to consider whether martial law might not have been terminated at an earlier period than the expiration of the thirty days allowed by the statute. We know how much easier it is to decide this question after than before the event, and we are aware, too, that sometimes the success of the measures adopted for the prevention of an evil deprive the authors of those measures of the evidence they would otherwise have had of their necessity. We have endeavoured, therefore, to place ourselves as far as is possible in the position of the Governor and his advisers at the time their determination was arrived at." Then after stating that on the 21st October, the rebels were defeated in their stronghold (the rebellion having broken out on the 11th, and that on the 24th the leader was taken): "From this time it must have been clear to all that the rising was put down, and that the only thing to be feared was simultaneous risings in other parts of the island. The question to be considered in deciding upon the conduct of the Government is not whether such risings were in fact

sioners, and that of the Ministers of the Crown, writing with deliberation after their report—that as one great object and advantage of martial law is in the exercise of deterrent measures, by the summary punishment of those engaged in the rebellion, those measures may be resorted to during the rebellion, and for some time longer than the duration of actual insurrection or open resistance, so long as the danger may reasonably be supposed to continue against which these deterrent measures are directed. And that a

likely to take place, but whether the Government, with the information then in their hands, had reasonable grounds for apprehending they might take place. It will be seen that they were receiving almost daily reports from different parts of the island, which must have led them to the conclusion that considerable danger of such risings existed. They could not at the time investigate, as we have, the grounds on which those reports rested. They were forwarded by the custodes of different parishes, in whom the Government was bound to place a certain amount of confidence, and they would have incurred a serious responsibility if, with this information before them, they had thrown away the advantage of the terror which the very name of martial law is calculated to create in a population such as that which exists in this island. But there was a course which might have been pursued by which that advantage would have been secured, and yet many of the evils ordinarily attendant upon martial law avoided. On the 30th October it was formally stated by the Governor that the wicked rebellion lately existing in certain parts of the county of Surrey had been subdued, and that the chief instigators thereof and actors therein had been visited with the punishment due to their heinous offences, and that he was certified that the inhabitants of the districts lately in rebellion were desirous to return to their allegiance. From this day, at any rate, there could have been no necessity for that promptitude in the execution of the law which almost precluded a calm inquiry into each man's guilt or innocence. Directions might and ought to have been given that courts-martial should discontinue their sittings; and the prisoners in custody should then have been handed over for trial by the ordinary tribunals." This plainly implied, it will be perceived, that for some ten days after the defeat of the rebels in their last stronghold, and after the capture of the leader, the danger and alarm still continuing, deterrent measures might justly have been pursued. There was nothing in the despatch of the Secretary of State, confirming the Report inconsistent with this; on the contrary he wrote, "If not from the capture of the leader, at least from the time when the reinforcements arrived, and the amnesty proclaimed, there could have been no necessity for the execution of prisoners, although even then the Government would have incurred a serious responsibility, if they had thrown away the advan-

Governor, so long as that danger continues, would be incurring a heavy responsibility if he were to throw away the terror which the name of martial law is calculated to inspire.

And although it has undoubtedly been justly laid down upon the same high authority, that the execution of martial law ought not to be continued any longer than is absolutely necessary for the suppression of the rebellion (*a*); and that,

tage of the terror which the name of martial law inspired." There is nothing in the charge of Cockburn, C. J., inconsistent with this in point of law, and his statement as to the facts, that the rebellion was over in a day or two, is, it will be seen, utterly at variance with the Report of the Commissioners.

(*a*) This was the great lesson laid down by the Jamaica case. Thus the Secretary of State wrote upon this question in these terms:—"It remains, at present, to consider the conclusions at which you have arrived with respect to the continuance of martial law in its full force, to the extreme limit of its statutory operation, and to the excessive nature of the punishments inflicted. In reviewing this painful portion of the case, the greatest consideration is due to a Governor placed in the circumstances in which Governor Eyre was placed. The suddenness of the insurrection; the uncertainty of its possible extent; its avowed character as a contest of colour; the atrocities committed at its first outbreak; the great disparity in numbers between the white and the black populations; the real dangers and the vague alarms by which he was on every side surrounded; the inadequacy of the force at his command to secure superiority in every district; the exaggerated statements which reached him continually from distant parts of the island; the vicinity of Hayti, and the fact that a civil war was at the time going on in that country;—all these circumstances tended to impress his mind with a conviction that the worst consequences were to be apprehended from the slightest appearance of indecision. You have justly observed how much easier it is to decide such questions after than before the event, and that sometimes the success of the measures adopted for the prevention of an evil deprives the authors of those measures of the evidence they would otherwise have had of their necessity. Yet, upon a full review of all the circumstances of the case, Her Majesty's Government cannot but agree with the conclusion of your report, "that by the continuance of martial law in its full force to the extreme limit of its statutory operation, the people were deprived for longer than the necessary period of the great constitutional privileges by which the security of life and property is provided for. They also agree with you that, at least from the time at which the reinforcements had arrived, and the amnesty was proclaimed, "there could have been no necessity for that promptitude in

in particular, it should be borne in mind "that future good government is not the *object* of martial law, that example and punishment are not its *end*, but only its means, and allowable only so far as necessary for its legitimate object; and that its severities can only be justified when, and so long as they are absolutely necessary for the immediate re-establishment of public safety:" yet, on the other hand, as it is obvious that this a question of degree, and one of delicate and difficult judgment, it is not one in which error can possibly be the subject of any criminal liability, but is a matter on which the Governor must exercise his discretion, subject only to the control and the approval or disapproval of the Crown. And in the consideration of this question, a wise and considerate minister, following the course of the wisest and greatest judges, will make large allowance for the difficulties of the case; nor will even a case considered fit for some extent of censure or disapproval be deemed a sufficient reason for questioning the legal immunity, or withdrawing the bill of indemnity practically necessary to give it full effect.

The question, it will be seen, resolves itself mainly into the control or continuance of those deterrent measures, by

the execution of the law which almost precluded a calm enquiry into each man's guilt or innocence;" and that "directions might and ought to have been given that courts-martial should discontinue their sittings. The prisoners in custody might then well have been handed over for trial by the ordinary tribunals." It may, indeed, be admitted that, as you have said, the Government would have incurred a serious responsibility if, with the information before them, they had thrown away the advantage of the terror which the very name of martial law was calculated to inspire; but it appears from the summary of the sentences by courts-martial appended to your report, that the numbers executed must have included many who were neither ringleaders of the insurrection, nor participators in actual murder or outrage of the like atrocity; while for the wholesale flogging and burning of houses, the circumstances of the case do not appear to furnish any justification. Future good government is not the object of martial law. Example and punishment are not its objects; its severities can only be justified when, and so far as, they are absolutely necessary for the immediate re-establishment of the public safety." (Desp. of Mr. Cardwell.)

to hold such trials; the nature of the offences to be tried, the constitution or procedure of the tribunals, the proof to be required, the penalties to be inflicted, or the period for which such trials should be allowed to continue, and the rules and principles by which they should be regulated, or the principles on which they should be controlled. The authority of courts-martial in such cases rests only on necessity, and the same necessity supplies the governing rule or principle which must guide all their proceedings.

As, according to the law of England, rebels are not less subjects because they are rebels; and, according to that law, subjects, even though rebels, cannot be executed without a trial (*a*), it follows that there must be prisoners; and

soners must needs be taken (unless a system of indiscriminate massacre is to be followed), and the question must needs arise whether or how they are to be dealt with, and they can only be either released or tried, for it is a principle of law that a British subject must not either be slain in resisting nor executed without trial. Thus, on the occasion of what was called the Manchester massacre, that the troops had killed men, unarmed and unresisting, and had cut down and trampled upon women; the court said, "If this were done; if unresisting men were cut down, whether by troops or not, it is murder, for which the parties are liable to be tried by the law of the country" (Abbott, C. J., 4 B. & Ald. p. 323). "At all events it would import a crime, which might be either murder or manslaughter, according to circumstances" (Best, J, *ib.* p. 327). That, however, was not under martial law, but the military were only acting in aid of the civil power under the common law; it was *not* martial law, under which rebels may be dealt with summarily with *some* trial. On the other hand, in *Wright* v. *Fitzgerald*, 27 State Trials, and in Governor Wall's case, 28 State Trials, it was laid down in clear accordance with the clearest principles of natural justice and English law, that even a rebel or mutineer must not be capitally punished *without trial*, though it may be a trial by court-martial. Hence in the Ceylon case, there were such trials, and the Government and Parliament upheld them. Hence, in the Jamaica case, the first questions put by the Secretary of State were, whether any person had been flogged or hanged *without trial*, and hence the Royal Commissioners examined carefully into the trials; all this implied an authority arising from necessity and an authority to be controlled by necessity.

(*a*) It is obvious that if there is not to be slaughter, there must be prisoners, and assuming that there are prisoners, unless they are simply to be held for the civil power, they must be dealt with by the military. But if the ordinary course of justice would suffice, there is no need of martial law

administration of this law of necessity by some kind of rule; and the most obvious is that afforded by the broad analogies of military law in time of war. Courts-martial, under ordinary military law, derive their jurisdiction, in cases within the Mutiny Act and Articles of War, from those enactments, which apply to soldiers in the service of the Crown, and of course cannot, in their terms, embrace soldiers serving against the Crown: as to which, whether in war or rebellion, enactments or regulations have not usually been provided, because they are not entitled to the benefit of regular rules made for the protection of the loyal soldiers and servants of the Crown. But as these enactments do not in cases not within their terms, limit the power of the Crown as to martial law, even over its soldiers in its service; so neither do they at all exclude, limit, or restrain the power of the Crown over soldiers—whether subjects or others—serving against it; so that as to the former, that is subjects, while, on the one hand, they incur the doom of traitors, and are, of course, not entitled to the rules of regular war, as ransom, exchange of prisoners, or the like, so, on the other hand, they are, as subjects, still within the protection of the Crown, and entitled, when not actually in conflict, to the rights of subjects, and, therefore, to trial at common law, except so far as the

criminate slaughter. Therefore, for the sake of humanity, there must be trials, and the trials must be legal, therefore the courts-martial must be deemed lawful tribunals. Now, if convened as drum-head courts-martial, or detachment general courts-martial are, by orders from the military commander, who holds a commission from the Crown which authorises him to convene such courts for trial of soldiers or persons liable to be treated as such, and they are composed of persons holding commissions from the Crown which authorise them to sit on such courts-martial, it is conceived that such courts during martial law are lawful tribunals, if it is true, as has already been shown, that the effect is to establish the state of war and the laws of war. Otherwise, how could a court-martial, in time of war, try and execute a subject who played the part of a spy. That case is not within the Articles of War, which apply in terms only to the soldiers of the Crown. How then is it? By virtue of the laws of war and their *general* authority as commissioned officers of the Crown.

exigencies and the emergency may necessarily deprive them of that privilege by reason of an urgent necessity for more summary justice; and the jurisdiction of courts-martial over them, therefore, rests upon necessity.

With regard to the *constitution* of courts-martial in the distant dominions, colonies, or dependencies of the Queen, where it would be impossible to constitute them regularly as required by the Articles of War (*a*), special provision is

(*a*) Thus, the Mutiny Act originally only applied to the Queen's dominions, and now mainly and almost entirely does so. So again it recites that it is only necessary in *time* of peace, solemnly declaring, as the reason for its enactment, that no man may be adjudged to lose life or limb in *time of peace* by martial law or by any other manner than according to the common law. Then its first enactment only limits the power of the Crown within the realm. "No person *within the United Kingdom or within the British Isles* shall, by the Articles of War, be subject to any punishment extending to life or limb or to be kept in penal servitude except for crimes which by the Act are expressly made liable to such punishments, or shall be subject, with reference to any crimes made punishable by the Act, to be punished in any way which shall not *accord* with the provisions of the Act." And then the second section restricts the articles and provisions of the Act to soldiers listed or employed in the service of the Crown. The power of the Crown, therefore, as to martial law even over its own soldiers out of the realm is not (except by one or two special provisions) limited or restrained by the Act or the Articles, still less is its power at all affected as regards soldiers not in its service, whether or not under subjection to it. As regards soldiers not in subjection, nothing need be said, save that they are left to the "custom of war." As regards soldiers in subjection to the Crown and serving against it, *i. e.*, armed rebels and traitors, the power of the Crown is just what it was at common law, neither more nor less, and it is conceived, that it is limited only by the extent of the necessity created by the emergency, although when that necessity ceases they are entitled to trial as traitors.

(*a*) These Articles ordinarily require a general court-martial to inflict a capital penalty (Art. 115), to consist of thirteen members (Mutiny Act, s. 8), but detachment general courts-martial are also allowed that power (117), and any court-martial may sentence any soldier to corporeal punishment for mutiny or for insubordination accompanied with personal violence, or while on active service in the field, for mutiny or any breach of the Articles of War, provided that no sentence of corporeal punishment of a regimental court-martial shall, except in cases of mutiny with personal violence, be put in execution *in time of peace* without the leave of the General commanding the district or station, superior to the officer by whom the

made by the articles, which allow of their being constituted of so small a number of officers as three, and to be composed also of members of both the land and marine services; provisions dictated by obvious sense and convenience, and, indeed, by that necessity which is the sole foundation for martial law, even as to the soldiers of the Crown. And further, there is special provision for the trial before courts-martial of all soldiers in these distant depen-

sentence may have been confirmed (118). No sentence of a general court-martial shall be carried into effect till after a report shall have been made to the officer commanding-in-chief; and no sentence of death shall be carried into effect in any of our colonial possessions until it shall have been approved by the civil Governor (123). These Articles, it will be observed, are only *obligatory* as to soldiers of the Crown, and are not, except by way of analogy, applicable to a case of martial law in rebellion; but the *spirit* of the provisions would apply by analogy, except so far as affected by the exigencies of the emergency and circumstances of distance, difficulty of communication, lapse of time, and the like. A detachment general court-martial shall have the same powers in regard to sentences upon offenders as a general court martial, but no sentence of a detachment general court-martial shall be executed until the General commanding the Army of which the division forms a part shall have approved and confirmed (124). Then the Mutiny Act, s. 12, provides that it shall be lawful for any officer commanding any detachment serving in any place beyond seas, where it may be found impracticable to assemble a general court-martial, upon complaint made to him of any offence committed against the property or person of any inhabitant by any person serving with or belonging to Her Majesty's Army, being under the immediate command of such officer, to convene a *detachment* general court-martial, which shall consist of not less than three commissioned officers, for the purpose of trying such person, and every such court-martial shall have the same powers, in regard to sentence upon offenders, as are granted to general courts-martial, provided that no sentence of any such court-martial shall be executed until the General commanding the Army of which such detachment forms part shall have approved and confirmed. Then the Articles of War further provided, that any soldier who may be serving in any place within our dominions beyond the seas (except India), *where there is no civil judicature in force*, by an appointment or under an authority competent to try such offenders, and who shall be accused of treason or of any other civil offence which, if committed in England, would be punishable by a court of ordinary criminal jurisdiction, shall be tried by general court-martial, and if found guilty, shall be liable, in the case of any offence which, if committed in England, would be capital, to suffer death, &c., no such punishment to be

dencies, even for such officers as would in this country be cognizable only before the ordinary criminal courts of the country, as rebellion or treason. And although the letter of these articles may only be applicable to the soldiers in the service of the Crown, it is obvious that they are equally applicable in spirit and in principle, and by very close analogy, as affording guidance in the constitution of courts-martial for the trial of soldiers against the Crown; that is, of rebels: and, indeed, it admits of great doubt whether some of these enactments are not in terms applicable to rebels.

If the declaration of martial law for the suppression of rebellion be, as it is conceived it is, the application to the rebels, on the ground of necessity for the public safety, and on the principle that they are soldiers, of that absolute military rule which is, it is admitted, applicable even to the loyal soldiers of the Crown, on the same principle of necessity in time of peace to a great extent by statute, and in time of war by prerogative; then the offences cognizable under martial law, and the penalties inflicted, may be derived by analogy from those applicable under martial law to soldiers; and, at all events, by analogy to

carried into effect until the officer commanding-in-chief shall have approved and confirmed (143). Now this enactment in terms applies to *any soldier serving* (not saying serving with our forces), and, therefore, there is really strong grounds for contending that it applies even in terms to rebels in arms, who are soldiers, although not serving their sovereign but serving against her, and so it seems to be considered and is so laid down in *Simmons on Court-Martial.* But at all events it is applicable in spirit and in principle, and by way of very close analogy to the case of armed rebellion, provided there is a *necessity* for its application in order to the suppression of the rebellion. Only it must always be borne in mind that no application of martial law to civilians can be justified *beyond* that necessity, which is its only basis or justification even as regards soldiers. If, however, by reason of a formidable armed rebellion and the suspension, by that course, of the civil judicature, so that it is practically powerless to deal with the danger, there is an urgent necessity for the application of the deterrent measures of martial law, these enactments appear to afford by analogy the most obvious guidance.

such as are defined in the Articles of War, which appear to embrace and render capital all wilful acts of mutiny and sedition, and all wilful attempts to stir up sedition. And, if the true theory be that of necessity for the public safety, the practical result is the same, for under neither theory would the enforcement of martial law be justified *beyond* the necessity; and, on the other hand, *within* that necessity it can scarcely be deemed unjust to apply to rebels, *i. e.* to soldiers in arms against the Crown, the same measure of justice as it applied to the soldiers of the Crown (*a*).

(*a*) Under the Articles of War, "Any soldier who shall begin, excite, cause, or join in any mutiny or sedition in any of our land or marine forces, or who, being present at any mutiny or sedition, shall not use his utmost endeavours to suppress the same, or who coming to the knowledge of any mutiny or intended mutiny shall not, without delay, give notice thereof to his commanding officers, shall suffer death or such other punishment as a general court-martial shall award" (Art. 36–38). Now the letter of this Article only applies to sedition in the army, but in principle and in spirit it is as applicable to rebellion, and the analogy indeed is perfect, when it is borne in mind, that in rebellion there is no neutrality, and that the General *is in command of the whole district*, and that the rebels are soldiers, and, therefore, *soldiers under his command*. So as to offences in the field, "Any soldier or officer who shall hold correspondence with or give intelligence to the enemy, directly or indirectly, or relieve with money or ammunition, or knowingly harbour and protect an enemy, shall suffer death, or who being employed in foreign parts shall force a safeguard or break into any house for plunder, shall suffer death or penal servitude," &c. The letter of these Articles applies only to soldiers employed by the Crown; but in war, even as to the soldiers of the Crown, the powers and penalties of military law are not limited by the terms of the Articles, as is admitted on all hands, and, therefore, it is beyond a doubt that a soldier under the Crown who should stir up a sedition against the Crown or its officers would be deemed amenable to the same penalty as for mutiny or sedition in the army, and in martial law the General is in command over the whole population, and the attempt to stir up the inhabitants against him would be justly made, if necessary for the public safety, amenable to the same military law as is applicable to the soldiers of the Crown *only* upon the ground of the same necessity. But then, undoubtedly, this view only rests upon and assumes the necessity. On the other hand, it will be obvious, that this necessity may exist to a greater degree in the case of a leader who is stirring up rebellion than in that of an isolated soldier or rebel who is merely caught in the act of mutiny or is taken in arms, for the latter only

The trials by martial law are under the entire control of the military Commander (*a*), primarily under the control of the military Commander of the declared district, who determines according to the analogies and principles of military law what courts-martial shall be held and what cases are fit and proper to be tried; but this is subject to the control of the Commander-in-Chief, before whom the proceedings should be laid for revision and review, unless, at all events, there is any such imminent and urgent necessity for instant execution of the sentence as precludes this course. And, beyond all doubt, considering, on the one hand, the analogies afforded by military law, and, on the other hand, the extreme importance of having a clear, calm, and cool review of capital convictions by a superior

represents the offence and the power of an individual, whereas the former may by his influence excite, and wield, and embody the force of hundreds or of thousands, and it does not consist with the sense of justice that the humble and ignorant soldier, who merely yields to an impulse of insubordination, should be for the sake of public safety sentenced to death, and that an educated person who raises a whole population to rebellion, and causes hundreds to rise, should not be amenable to military law, provided it appears necessary for the safety of the province, and the suppression of the rebellion.

(*a*) That the primary authority would be in the military Commander of the district, but subject to the control of the Commander-in-Chief of the colony, is shown conclusively by what occurred in Jamaica, where the General in command, on a question arising as to jurisdiction to try a case by court-martial, submitted it to the Commander-in-Chief, and acted on his opinion in declining to try the cases, on the ground that they were not connected with the rebellion (Ev. p. 682). The Commander-in-Chief, in that case, gave general directions to the General in command, and only abstained from giving more specific directions because he had confidence in his discretion. He gave it, indeed, as his opinion before a Royal Commission of enquiry, that he had nothing to do with the courts-martial, but the above shows that he might have had, and the facts proved before the Commission abundantly showed that it would have been far better if he had. For although he gave a particular order to one officer as to the proper course under martial law, viz., to try the prisoners speedily, and only execute those taken red-handed, no steps were taken to see if this rule was followed, and in point of fact unhappily it was not, and some persons were executed without any evidence of guilt. That he would have had authority to order the proceedings to be laid before him for revision is manifest,

Commander, standing aloof from the heat, the haste, and the excitement of the district in rebellion, it is most *desirable* that there should be such review.

The execution of martial law, and the measures to be taken, especially the trials by court martial, being necessarily, from their nature, as being carried out under military authority, matters for military regulation, it is the military Commanders who are primarily responsible. All that the Governor can do is to communicate to them, or rather to the Commander-in-Chief, general directions, leaving it to them, or to him, to carry them out by issuing the proper military orders to the officers, and by seeing that their orders are observed and obeyed (*a*). And the general tenour of the Governor's directions will doubtless be to restrict trials by courts-martial to the graver and clear cases of criminality, as murder, arson, and the like.

and in point of fact, as already seen, he did give orders, and some cases were submitted to him.

(*a*) Thus, in the Jamaica case, about ten days after the operation of martial law began, the Governor wrote to the Commander-in-Chief: "I am of opinion that all prisoners should as rapidly as possible be tried, and those who are *not deserving of death* or flogging be released. It is not desirable with our over-crowded gaols to sentence prisoners to imprisonment, nor would I advise that flogging should be resorted to more than can be helped." The Commander-in-Chief then sent this in a letter to the military Commander, and it was his duty to see that it was carried out. After this the Governor wrote: "It is my intention to proclaim a general amnesty in the county of Surry to all *except those who have been participators in the murders*, excepting those who are found in possession of stolen property, and excepting those who are now prisoners awaiting trial, upon their coming in and reporting themselves to the civil or military authorities as submitting themselves to the Queen's authority" (Desp. Oct. 26). And a little afterwards to the Commander-in-Chief: "I would beg to suggest that the Colonel should be requested to furnish all the evidence he can, either written or oral, against *each and all* of the prisoners sent in under his authority; and if no evidence of *serious crime* was obtainable, they would, as a matter of course, be released. If any of the prisoners sent in were taken in arms or with stolen property in their possession, *the parties who captured them should appear before the Courts to give evidence against them*. It is only the captors who can declare the grounds upon which the captures were made" (Desp. Oct. 30, 1865).

The key to all questions as to acts cognisable by courts-martial, under martial law, is the principle that martial law is a measure of military necessity for the purpose of meeting a state of war; and that, therefore, it is restricted to acts *connected with the war*. It is important to bear in mind that courts-martial under martial law are, upon general principles, restricted to the trial of offences committed in causing, or in carrying on, or aiding and abetting, the rebellion; and therefore are, in point of place, restricted to acts done or taking effect within the district declared, and, as to time, are precluded from trial of offences prior to the rebellion, and not committed in causing or inciting to it. It is a general principle that the trial of crimes is local (*a*), and that it depends upon the

(*a*) This principle is as ancient as any in the law, and hence in the Year Books it is laid down, that a man, who sends another to commit a murder in another county, is guilty of murder where the murder is actually committed. The strongest illustration of the principle was afforded in a case where a man who had committed the offence of abduction in Ireland, where it was capital, was seized in England, taken to Ireland, convicted and executed (*Rex* v. *Kimberley*, 2 Strange's Reports, 848). The principle is, that crimes are in their nature local, and the jurisdiction (in the trial of crimes) is local (L. C. Justice De Grey, *Raphael* v. *Verelist*, 2 Wm. Blackstone's Rep. 1058), which was the case of imprisonment abroad under the orders of the General of Bengal. So on this principle it was held, that a person who had committed a crime in England might be arrested in Scotland, and so in the converse case (*Mure* v. *Ray*, 4 Taunton's Rep. 43). Hence it was held, that a British subject, arrested abroad on a warrant upon an indictment for a misdemeanour, brought in custody to England, and there committed to prison, is not entitled to be discharged (per Lord C. J. Tenterden, and Parke, J.; *Ex parte Scott*, 4 M. & R. 361; 9 B. & C. 446). Where the crew of a Dutch ship had mastered the vessel and ran away with her, and brought her into Deal, it was held, that they might be seized and sent back to Holland (*Mure* v. *Kay*, 4 Taunt. 43). The truth is, that it is a fundamental principle that at common law, and apart from statutable or special law, causes can only be tried in the counties where they were committed (See *Rex* v. *Burdett*, 4 Barnard's & Alderson's Reports). And in cases of offences which do not require personal presence the crime is committed where it is caused and directed. Thus an information at common law for a conspiracy, for planning and fabricating false vouchers to cheat the Crown (which planning and fabrication were done beyond seas), is well triable in a county where the receipt of the false

locality of the offence. Therefore, it follows that a person cannot be tried under martial law for an offence committed out of the district; though, on the other hand, it equally follows that he may be tried under martial law for an offence in its nature cognisable by martial law, if either virtually or constructively committed within the district, though he is out of it when arrested, and even though he has never personally been there at all. For it is familiar law that a man who intentionally causes a crime commits it where it is caused.

With regard to the time at which acts or offences must have been committed which are cognisable under martial law, it follows on the same principle that courts-martial under martial law can only take cognisance of such acts as

vouchers, transmitted thither by one of the conspirators through the medium of the post, and the application there of a third person for payment, which he there received, took place (*Rex* v. *Brisac*, and *Rex* v. *Scott*, 4 East, 164). So in the case of a libel, if a publisher receives a letter, the letter itself containing expressions of the writer, indicative of his having sent it to the publisher for the purpose of publication—the whole is evidence sufficient for the jury to find a publication by the procurement of the defendant (*Rex* v. *Johnson*, 7 East, 65) in the place where *it is received*. It was, indeed, once doubted whether a libel be triable in any county but that where the publication took place (*Rex* v. *Burdett* (*Bart.*), 3 B. & A. 717; 4 B. & A. 95). But it is now held, that where a defendant writes and composes a libel in one county, with an intent to publish, and *afterwards* publishes it in *another*, he may be indicted *in either* (*ibid*). When a letter was inclosed in an envelope, and *received in the county of* M. open, accompanied with written directions for publication, as expressed in the envelope, this was evidence to go to a jury of a publication in M. That law, however, only applies to libel, and if the offence is the incitement to rebellion, the crime is committed where the *incitement takes effect* and where it does its mischief (*ibid Rex* v. *O'Connor*, 13 Law Journal (Magistrates' Cases), 33; *Rex* v. *Hunt*, 10 Queen's Bench Rep. 925). So in other cases the locality of the crime is where the crime *takes effect*, thus, in obtaining goods by false pretences it is *where the goods were obtained* (*Regina* v. *Stanbury*, 4 Cox's Criminal Cases, 94). This principle was lately applied by a very learned judge in the case of a trial by court-martial, a case in which an officer was removed from Calcutta to Rangoon, to be tried there for an offence committed there, and the learned judge (Mr. Justice Willes), held it lawful, laying it down, as a general rule and principle of law, and *one of universal application*, that crime is local in its trial, and that offences

have been committed *in causing or keeping up the rebellion* (*a*); and though it is to be borne in mind that, as the declaration of martial law is only the declaration of a state of things already existing, and therefore its operation really commences from the time of the rebellion which raises the necessity for it, and so the courts can take cognisance of acts, in causing the rebellion, committed before the *declaration* of martial law; they cannot take

are to be tried where they have been committed (*Keighley* v. *Bell*, 4 Finlason's Crown and Nisi Prius Reports, 790; where see a note collecting all the cases on the subject). The principle was admitted by Cockburn, C. J., in his charge in Nelson's case, the case of Gordon, who was removed into the declared district to be tried by court-martial there for alleged incitement to the insurrection there. He distinctly laid it down that (as the Author had laid it down in his book), even assuming the arrest to have been illegal (as it clearly was not, for not only a Governor or Secretary of State but any one may arrest on suspicion of such a crime), the *illegality of the arrest or custody would not affect the legality of the trial*, and he put the very case put by the Author in his book, of a man committing a murder in one county and flying into another and illegally arrested and brought into the county where the crime was committed, where, beyond all doubt, he could legally be *tried*. It was, indeed, suggested by Cockburn, C. J., that if a man is triable in two places for an offence committed partly in one and partly in another, he cannot be tried in either at the option of the authorities, and that supposing martial law in force in one of them, he cannot be tried there; but this surely would depend upon whether there was any real ground for trying him by martial law. And the Lord Chief Justice, it is conceived, fell into error in supposing that the crime of inciting to insurrection can be committed anywhere but where the insurrection is incited. Moreover, he was in error in the particular case in supposing that the prisoner could have been tried anywhere but where he was tried, seeing that local statutes prevented it, and required his trial in the district which was under martial law. And the question, therefore, really was, whether there was any case for trying him under martial law at all, which would depend upon the nature of the offence charged and of the evidence to be adduced in support of it (*vide* the Jamaica statutes, 5 & 6 Vict.).

(*a*) No point is better understood than this in military law, and as courts-martial are only allowable as military measures, and are, therefore, under military authority, it is for the military authorities to determine, in the first instance, what cases are or are not within their jurisdiction, and their decision that they will not try a case is conclusive. Thus, in the Jamaica rebellion, certain cases having been sent to the Commander for trial, which

cognisance of acts prior to and also unconnected with the rebellion.

The most important consideration, however, with reference to trials by courts-martial under martial law is, it is manifest, as to the nature of the acts or offences of which they may properly take cognizance. This is important with reference to the nature of the proof to be required, and which such tribunals may properly consider, and, especially, with reference to sentences; above all, as to the

the General in command deemed not within his jurisdiction, he referred the matter to the Commander-in-Chief, and wrote thus to him: "Having deemed it my duty to refer a case of one of the prisoners sent up for trial, in order that I might be informed on certain points connected therewith, so that the decision on such case might be my guide as to the disposal of the cases of the prisoners, and having just had the honour to receive your opinion on the several points submitted, I have arrived at the decision that on my own responsibility I do not consider myself justified in arraigning these prisoners before a court-martial. My reason for thus doing so is—these prisoners all uttered the sentiments which are said to be seditious, prior to the rebellion; and though I may have the power and authority under martial law (a power to myself very doubtful), yet it is a power I do not feel myself justified in exercising, and which I shall not exert unless I receive positive orders so to do. The prisoners shall be kept under surveillance till your instructions respecting their disposal be received." Upon which the Commander-in-Chief wrote: "I entirely coincide in the opinion of the General. We may have the authority and power, but would not be justified to try the prisoners by a military court-martial." The Governor upon this wrote: "I assume that in coming to this decision, the General has satisfied himself in each case that there *is no evidence directly connecting the prisoners with outbreak*, and in this view of the case I consider General Nelson has exercised a wise and just discrimination in coming to the determination he has done." This must have meant the rebellion, of which the first outrages were the outbreak, not merely the particular outbreak itself, for that was prior to martial law. What the Governor meant was, what the General had expressed in a communication to the magistrate, viz., that there was no complicity in the rebellion. It was only by connection with the continuing rebellion that complicity in the outbreak, which was before martial law, would differ from seditious language prior to martial law, not connected with the rebellion. And it should seem, from the language of Cockburn, C.J., in Nelson's case, that he concurred in the view that a man who had caused the rebellion might be amenable to martial law, although he had committed no act since the declaration of martial law.

may have been an open and overt act, great difficulties may arise at common law, even in this country, especially as to proof of the criminal intent.

It is as to this consideration the question is of most importance, whether the offences of which cognisance may be properly taken under martial law, and the penalties that may be inflicted, are those of the ordinary law, or of military law; the latter being, as already has been seen, marked by so much more severity than the former. As the offence of mere rebellion is not at common law capital unless associated with murderous purpose or treasonable intent (*a*), it required a statute to render it capital; and in

there may be a destructive rebellion without any of them. It is, indeed, curious, and may appear a paradox, that, by our law, rebellion as such is not a crime. That is to say, riot is a mere misdemeanour, and, except where, by the Riot Act, it is converted into a constructive felony, rebellion is not, per se, a crime, except united either with felony or treason. Thus, therefore, by ordinary law, rebellion in a colony cannot be crime, at all events, not a capital crime, unless it is either for the commission of a capital felony or murder, or is executed with the actual intent to effect one of the specific objects mentioned in the statute. So that the clearest proof that a man has caused a rebellion which may ruin a colony, will not make him amenable to a capital penalty, unless it appears that he intended murder, or to deprive the Crown of the colony. And if it be necessary, in order to arrest the progress of the rebellion, to inflict a capital penalty on its leaders, the common law may be ineffective, for want of proof of intent to commit either of those crimes; and as the intent to deprive the Crown of the colony, if it cannot be proved against the leader, is still less likely to be proved against the tools; practically, no one will be liable to capital penalty by the ordinary law except those guilty of murder, unless there are any local laws which may make arson, or any other crime, capital. And, on the other hand, under ordinary law, whatever the crime, and however clear the proof, the criminal cannot be punished without formal trial.

(*a*) A statute, the Riot Act, was necessary to render mere rebellion a capital felony; and it is hardly necessary to say, that in our own times, such a penalty would never be inflicted, except in actual dispersion, unless it amounted to treason. The difficulty at common law, even in this country, in cases of constructive treason, may be well illustrated by the case of Lord George Gordon, who was indicted for treason in levying war against the King. The case on the part of the prosecution was, that the prisoner, by assembling a great number of people, and encouraging them to destroy the two Houses of Parliament, and commit different acts of

(except in some extreme or exceptional case of imminent necessity for such an act), to be capitally punished except for such offences; and that, therefore, in order to support a capital sentence, there must be a trial and conviction upon such a charge. That is to say, the charge either of treason or of murder, or of the legal guilt of one or other of those offences.

And, on the other hand, it is not to be assumed that, at all events, as regards the former head of offence, courts-martial under martial law ought to take cognizance, in all cases, of offences capital, by ordinary law, as for

statutes, so that in the present state of the law, it is generally more advantageous for the Government to treat such an offence as felony than as treason" (*ibid*). That Act, however, and, probably, any other similar Act afloat, only applies to the actual rioters, not to others, even their leaders, if secret or absent; and, it is obvious, that the dispersion of a riot is not the suppression of a rebellion. As our statute law, however, has rendered rebellious risings capital offences; and as, by military law, the stirring up of a sedition is capital, it should seem, by analogy, that if there is an emergency such as justifies a resort to measures more stringent and summary than those of ordinary law, there may be nothing unreasonable, under the pressure of necessity, in enforcing a similar penalty for such offences, or, in other words, in applying to rebels more summarily the penalties which an ordinary law applies to them by regular process of law, or applying to rebels the same summary severities which, in time of war, are applied to soldiers. It would be no less a departure from ordinary law to execute a man summarily for murder; it would be no more a departure from ordinary law to execute a man summarily for a felonious riot. If caught in the act of riot, and refusing to disperse and resisting arrest, they may be slain on the spot by our own law; and if not so caught in the act, but clearly guilty not only of that, but of worse offences, and there exists a more urgent necessity, arising from an extraordinary emergency, it is, after all, only an extended application of the principles of our own law, both municipal and military. And martial law is, in fact, only such an extension, by analogy, under the pressure of an urgent necessity. In a case, however, of a colony, in which there is no Riot Act, or the rebellion is carried on by other means than riotous assemblies, there may be a necessity for the application of analogies derived rather from military than municipal law, though the military law is only an extension of the municipal law, on account of necessity, and the same necessity may justify the extension of the military law, as it prevails in time of war, to the rebellious part of the population.

instance, constructive treason or presumptive complicity in murder. With regard to the nature of the acts or offences allowed to be tried under martial law, whether or not there be, as there have been in Ireland and in India (*a*), any Regulation on the subject, a Colonial Governor will do well to observe and adhere to the spirit of the admirable Regulation issued by the Indian Government half a century ago, and the Irish Rebellion Act of 1833, which very judiciously restricted the province of courts-martial to open and overt acts of complicity in a treasonable rebellion, acts admitting of clear and conclusive proof, and not cases of doubtful or constructive guilt.

(*a*) See the Irish Rebellion Act, 1833, (*ante*, p. 133) and the Indian Regulation, to be found in *Hough's Military Law*, with the additional advantage of a valuable exposition by that sound lawyer, Mr. Serjeant Spankie, then Advocate-General of Bengal. The preamble of the Regulation states, that it may be expedient, in certain cases, that the Governor-General in council should declare and establish martial law for the safety of the British possessions, &c., by the immediate punishment of persons owing allegiance to the British Government who may be taken in arms in open hostility to the Government, or in the actual commission of any overt act of rebellion against the authority of the same; or in the act of *openly aiding* and abetting the enemies of the Government within the territories specified. Then the enacting part, conformably to the object developed in the preamble, enacted that the Governor-General in council shall be empowered to direct (among other things) the immediate trial by courts-martial of all persons owing allegiance, and who shall be taken in arms in open hostilities to the British Government, or in the act of opposing by force of arms the authority of the same, or in the actual commission of any overt act of rebellion against the State, or in the act of openly aiding or abetting the enemies of the British Government. The commentary of Serjeant Spankie upon this was: Four overt acts are enumerated, and it seems clear that the words 'taken in the fact' must, by necessary construction, be carried forward and annexed to each member of the sentence containing the description of the overt act. The circumstances in which courts-martial are to have authority to act are very clearly defined. The criminals must be taken in open acts of the treasonable and rebellious description mentioned. If there could be any doubt of the extent of the authority and jurisdiction of the courts-martial, it would be removed by the instruction communicated for their guidance during the disturbances. If any person charged with any of the overt acts specified shall be apprehended by any military officer, when not in the actual commission of offences of that description, they

It is to be borne in mind that martial law is the law of war, and cannot be allowable except in case of rebellion, which amounts to war against the Crown, and therefore is treasonable; and that as, when applied to soldiers, it takes cognisance only of clear and manifest acts, so that, as regards other than soldiers, these acts ought, at all events as a rule, to be such as by ordinary law are capitally punishable, as acts of adherence to open enemies and traitors. And bearing further in mind that, so far as either the direction of legislative wisdom (*a*) or the opinions of able

shall be handed over to the civil power. The courts-martial do not appear to have considered themselves as at all confined to cases of persons taken flagrante delicto, or even to traitorous and rebellious acts of the specific quality stated in the Regulation. The manifest intention of the Government was, that none but cases of the simplest and most obviously criminal nature should be the subject of trials by courts-martial; the fact whether a person was taken in the actual commission of an overt act of rebellion, or in the act of openly aiding or abetting the enemies of the State, or taken in arms in open hostilities, might safely be tried by such courts, and such a provision for trial was calculated to prevent military severity in the field from becoming absolute massacre. But all complex cases, depending upon circumstantial proof, and requiring either a long examination of facts, or a discriminating inference from facts in themselves equivocal, were purposely withdrawn from the cognizance of these tribunals. It never was intended that these tribunals should try acts even of a criminal nature in which the prisoner was not taken, and unless the acts were open overt acts, and of the most material palpable quality. It is important that the courts-martial should be confined to cases of the most obvious and dangerous criminality" (*Hough's Military Law*, p. 348-350). That, however, was on a *special Regulation*, and the author adds, the having arms concealed in houses should be a punishable crime, and as such would allow of military courts trying such cases under certain conditions. There may be various acts, such as circulating papers, exciting disaffection, &c., which should be defined, and the punishments laid down (*ibid*).

(*a*) As in the Indian Regulations already alluded to, and in the Irish Rebellion Act, 1833, which declares martial law against open enemies and traitors, and prohibits trials for mere sedition. So as to the case of Mr. Grogan, who was tried by court-martial in Ireland for *treason*, in the opinion of Mr. Hargrave upon it, which was cited by the Lord Chief Justice in his charge, it appears to have been the opinion of that eminent lawyer, that a man could not properly be tried by court-martial for such an offence as constructive treason, *i. e.* merely compassing a rebellion. That seems

lawyers have been declared upon the subject, they have tended to the conclusion that courts-martial, under martial law, should only take cognisance of clear and undoubted acts of causing or aiding and abetting a rebellion, either treasonable in its character, or involving such attacks with armed force as must lead to murder; it should seem that this is the safer rule to follow, although it cannot perhaps be laid down that it is fixed and inflexible.

As to both the offences alluded to as capital under ordinary law, at all events in this country (although as to any other crime likely to be capital by the law of any colony—as arson or robbery with violence—it may be usually otherwise), a party may be legally guilty and amenable, even to a capital penalty, by reason of privity or complicity (*a*), either as a co-principal in treason or as

the real purport of his opinion, and, at all events, to that extent it appears sound.

(*a*) There are some elementary principles of our criminal law so deeply seated in common sense and justice, that they would hardly require authority, if it did not appear that they have lately been doubted, disregarded, or ignored. Thus that men are answerable for acts they *cause*, as well as for acts they *do*, is a fundamental and general principle. Hence in treason, men are liable for *a conspiracy* to levy war, and the conspiracy being the offence, the rule is that all are principals. In regard to murder again, a party may be liable to the *penalty* of a principal, although only an *accessory*, and although not personally present at the commission of the act, just as if personally present he may be liable as a *principal*, although he did not otherwise join in the act. An indictment lies against all persons who actually connive at, or who procure, or assist in the commission of a crime. The general definition of a *principal* in the first degree is, one who is the actor or actual perpetrator, but it is not necessary even that he should be actually present when the offence was committed (*Foster's Crown Law*, 349), and if a person, not aware of the consequences of the act, is incited to the commission of murder or any other crime, the inciter, though absent when the act was committed, is liable for the act of his agent, and is a *principal* (*ibid*; *Hawkin's Pleas of the Crown*, C. 31). If the perpetrator is aware of the consequences of the act, he is principal, and his employer, if absent when the act is committed, is an *accessory before the fact* (*ibid*; *Regina* v. *Williams*, 1 Denman's Crown Cases, 39). An accessory before the fact is one who, being absent when the felony is committed, doth procure, counsel, or abet another to commit it (*Rex* v. *Gordon*, 1 Leach's Crown Cases, 515; East's Pleas of the Crown, 352). And the

an accessory in the crime of murder, without any personal presence, or, possibly, even without any actual or express direction of the particular act committed, if it be in pursuance of a general design, or of general directions, or even if it be the natural result of actual incitements or general directions; a man being held liable for all that ensues in the execution of an act he has incited to, although there is no evidence, otherwise than by those very incitements, of an actual intent to direct the particular acts committed, at the precise time and place at which they were committed.

For it has always been a general principle of our criminal law (*a*), that men are to be judged by their words and

procurement may be through the intervention of others (*Foster's Crown Law*, 125; *Regina* v. *Cooper*, 5; *Carrington* v. *Payne*, 535), it may be also direct, by counsel or conspiracy, or indirect, by evincing an express liking, approbation, or assent to another's felonious design, though not bare concealment or mere tacit acquiescence (2 *Hawkin's Pleas of the Crown*, C. 29). And although if the accessory counsel or incite to one kind of crime, and the others commit a different one, he is not liable; it is clear that if the crime he does incite to is by mistake committed against others than those he intended, he is liable; and that he is liable for *all that ensues upon the execution of the unlawful act incited*, as, for instance, if he incites to beating, and the party is beaten to death, the inciter is accessory to the *murder* (4 *Blackstone's Commentaries*, 37). And several persons may be convicted on a joint charge against them as accessories before the fact to a particular felony, although the only evidence against them is of separate acts done by each at separate times and place (*Regina* v. *Barber*, 1 Carrington and Kirwan's Rep. 442). Formerly an accessory could not, unless tried with the principal, be tried until the principal had been convicted, but by statute, 7 Geo. IV. c. 65, this was long ago altered, and the accessory might be indicted for a substantive offence; and, by a more recent statute, it has been enacted that the accessory shall be liable to the same punishment as the principal, that is to say, that if a man incites another to a murder, or to an unlawful act to be carried out without regard to consequences, and in the execution of which murder naturally ensues, he is to be deemed guilty of the murder, as if he himself struck the fatal stroke, and is to suffer death as the actual murderer. This is law as old as the Year Books, in which the case is put of a man in one county inciting one in another to commit a murder, and held, *guilty of the murder in that county*, although never there in his life. And this ancient principle of law has thus, being based on obvious justice, been lately re-enacted by the Legislature.

(*a*) Thus with regard to seditious speeches and proclamations, it is said

acts, and are to be held criminally liable for such consequences as their words and acts were naturally calculated to produce, upon the obvious principle that they must be *presumed* to have *intended* the consequences which they cannot but have *contemplated*, and must be taken to have contemplated, because they are so obviously the natural result. And thus it may be that even at common law, a person may be liable to the guilt of treason or murder, and amenable to the capital penalty for acts of rebellion, in which there has been no personal presence or concurrence, and possibly no actual privity; the liability being, by

they endanger the public peace by stirring up the parties immediately concerned in it to acts of revenge, because they have *a direct tendency to breed among the people a dislike to their governors*, and incline them to sedition and rebellion (*Hawkin's Pleas of the Crown*, B. 1, c. 70). This direct tendency is to stir up rebellion, which may be comparatively unimportant in the time of peace, but become fearfully formidable in a time of popular excitement and of imminent insurrection, when large multitudes of the people are only waiting on a little incitement to raise an actual rebellion. Therefore martial law deals with it very severely. Under the Articles of War it is a capital offence to raise a mutiny, or endeavour to do so; and a man could certainly be held guilty who had used language, the natural effect of which was to stir up a mutiny, while no other evidence was or could be given of his actual intent. It is manifest that in many cases it is impossible to prove men's intentions but by their actions. And it is a general principle that men are deemed to contemplate the natural consequences of their actions, and to intend what they must have contemplated. Our whole law of constructive treason is based on this principle, and men are taken to intend the death of the Sovereign from conspiring to dethrone her. In Horne Tooke's case, the judges said in the House of Lords, "The crime of seditious libel consists in conveying and impressing injurious reflections upon the minds of the subject. If *the writing is so understood by all who read it, the injury is done by the publication*, before the matter comes into court" (*Cowp. rep.* 685). So Lord Mansfield said, "It is the duty of the jury to construe *plain words according to their obvious meaning, and as everybody else who reads it must understand them*" (*ibid.* 680). And it has been laid down as a clear legal principle, that a person who publishes that which is seditious, must be taken to have intended that which it is necessarily and obviously calculated to effect, unless he can shew the contrary, and the onus of proving the contrary is upon him (*R.* v. *Harvey*, 3 B. & C. 257). And if its contents were likely to excite sedition—that is, sedition in general—he must be presumed to have intended it (*R.* v. *Burdett*, 4 B. & Ald. 45). In

reason of the intent to be presumed from the natural meaning and effect of the language he has used,—assuming that its natural effect is to incite to such acts, or to acts which naturally must have such results, whether or not intended to take effect at the precise time or place.

Such being the general rules and principles under which martial law or military rule may be administered by courts-martial, as a measure of military necessity excused by the emergency, it is manifest that there must be great difficulty in dealing, under martial law, with the case of a man (*a*)

the highest crime known to the law, treason, you act upon presumption; on proof of rebellion, or the endeavour to excite rebellion, you presume an intent to kill the King. In highway robbery, if a person is found in possession of the goods recently after the crime, you presume the possessor guilty, unless he can account for the possession. In the case of a libel, which is charged to be written with a particular intent, *if the libel is calculated to produce the effect charged to be intended, you presume the intent.* Crimes of the highest nature, more especially cases of murder, are established upon presumptive evidence only, and the wellbeing and security of society must depend upon receiving of such evidence (Lord Mansfield, in the Douglas case, cited in 4 B. & Ald. 122). In the Author's former work, intending to write in the spirit of the above, which he cited, and not intending to go beyond them, and citing the case of a man who it was admitted had used language calculated to incite to rebellion, but who, it was urged, had not been proved to have intended a particular massacre which took place, the Author wrote some sentences, in one or two of which, by a slip of the pen, the absence of intention was spoken of, instead of absence of express proof of it, and it was supposed by Chief Justice Cockburn in his charge, that the Author meant that men might be convicted without proof of acts "contrary to their intentions, and beyond the scope of their motives." It is hardly necessary to say that the Author intended nothing of the kind, and meant no more than is conveyed in the above cases, which he cited, in order to illustrate what he meant; and moreover, he always carefully adapted the application of their doctrine to cases under martial law, with the assumption of *necessity*. Under martial law, the question is, whether it is plain he was the cause of the rebellion, and that *his death is necessary* to remove the danger he has caused.

(*a*) Such was the case of Gordon, in the Jamaica rebellion. He was a man of colour, of unbounded influence among the blacks who were in rebellion, and it was widely known in the island that he had in his mind a revolution (Ev. of Ford, Beckwith, and others), with reference to which he had said, that all the powers of the great Napoleon could not put down the

reputed to be the real cause and secret leader of the rebellion, and who has so acted as to be looked upon universally as its head, but who yet may have abstained from any open and overt act during the rebellion or since the declaration of martial law, and may even have absented himself from the district covered by the rebellion and under martial law; but with whom, on account of the very fact that he is regarded by the race or class in rebellion as their leader and their head, it may appear to the colonial

rising in Hayti, and that it was successful, *because the troops died of disease, before they could meet the people in the mountains.* And he added that India was not a case in point, for India was a flat country, and the English troops could overrun and conquer it; but Jamaica was a mountainous country, and before the English troops could reach the people in the *mountains, they would die of disease* (Ev. of Ford). For months before the rebellion he had been going about the island in company with the chief active leaders of it, using language of an inflammable character, against the tendency of which to excite a rebellion his friends warned him, and in the course of this system of agitation it was, at all events, stated that he had urged the people to do as they had done in Hayti. At all events, so obvious was the tendency of his language to excite rebellion, that a friend foretold "the charges of anarchy and tumult which must follow these powerful demonstrations" (Ev. of Mr. Eyre and Mr. Ford). The effect which was likely to follow the meetings which took place during the spring and summer of 1865, in some of which Mr. Gordon took a part, was foreseen by one of his most ardent supporters, who, writing to a common friend on the subject, used these words: "All I desire is to shield you from the charge of anarchy and tumult, which in a short time must follow these fearful demonstrations." And, therefore, "it appears exceedingly probable that Mr. Gordon, by his words and writings, produced a material effect on the minds of Bogle and his followers, and did much to produce that state of excitement and discontent in different parts of the island, which rendered the spread of the insurrection exceedingly probable; it is clear, too, that the conduct of Gordon had been such as to convince both friends and enemies of his being a party to the rising. We learn from Mr. Gordon himself that where he carried on business, this was the general belief as soon as the news of the outbreak was received. But it was fully believed by those engaged in the outbreak. Bogle did not hesitate to speak of himself as acting in concert with him" (Report of Commissioners). This being universally known when the rebellion broke out, the Governor, within the first few days after the rebellion had broken out, took a course which he thus described and explained at the time: "There was one very important point to be decided upon. Throughout my tour I found

authorities necessary to deal in some way with a view to the thorough suppression of the rebellion, or the apparently imminent peril of its revival.

In such a case the Governor of the colony may consider himself called upon to strike, as a measure not more of justice than of necessity, at the person whom, not only he, but the entire colony, regard as the real origin and head of the rebellion (*a*); and, with that view, in the first instance,

everywhere the most unmistakeable evidence that Mr. Gordon, a coloured member of the House of Assembly, had not only been mixed up in the matter, but was himself, through his own misrepresentations and seditious language, addressed to the ignorant black people, the chief cause and origin of the whole rebellion. Mr. Gordon was now in Kingston, and it became necessary to decide what action should be taken with regard to him. Having obtained a deposition on oath that certain seditious printed notices had been sent through the post-office, *directed in his handwriting, to the parties who have been leaders in the rebellion*, I at once called upon the Custos to issue a warrant, and capture him." *Nearly all coincided in believing him to be the occasion of the rebellion, and that he ought to be taken;* but many of the inhabitants were under considerable apprehension that his capture might lead to an immediate outbreak in Kingston itself. I did not share in this feeling. Moreover, considering it right in the abstract, and desirable as a matter of policy that, whilst the poor black men who had been misled were undergoing condign punishment, the chief instigator of all the evil should not go unpunished, I at once took upon myself the responsibility of his capture."

(*a*) It has already been seen, that persons are amenable to martial law for acts done in causing the rebellion, which must, of course, necessarily be before its outbreak, and, therefore, before the *declaration* of martial law, and also that persons may be amenable to martial law for acts done or directed or caused, within the district under martial law, even although they are, when arrested, out of it or have never been in it. Further it has been seen, that a Governor, like a Secretary of State, may certainly do what an ordinary magistrate may do, viz., arrest upon sworn information for sedition or treason, added to which, it is laid down by our Crown lawyers, that any one may arrest on reasonable suspicion of felony, and that *general belief is reasonable cause* (*vide Hawkin's Pleas of the Crown*). So that an arrest under such circumstances would clearly be lawful. But an arrest, of course, would be idle except with a view to some trial, whether at common law or under martial law, and in either case the trial for rebellion could only take place, upon principles already explained, in the district *where the rebellion was caused*, it being there and there only, if at all, that the crime of *causing* it was committed, though the mere offence of publi-

to direct his capture and arrest, even although he is not at the time within the district under martial law; and this, it is clear, he may lawfully do, provided he has, at all events, a sworn information of some such fact—for instance, recent communication between him and the active leaders of the rebellion—as may afford, along with general belief or suspicion founded upon facts universally known, reasonable ground of suspicion of complicity with them in the rebellion. And it would further be lawful for the Governor to send the party in custody to that district where, if at all, he had caused the rebellion to break out, and where, if at all, he was liable to be tried, either at common law, or by martial law.

The prisoner being there, it would be, upon principles already explained, entirely for the military authorities to determine whether or not they had, according to military law—that is, the custom of war and usages of the service in like cases—jurisdiction or authority to try him by martial law (*a*); and it would be lawful for the Governor to refer

cation of seditious matter may be triable *either* where it was posted *or* where it was received. Added to which, in the case referred to, by reason of local statutes, the prisoner could only be tried, even at common law, within the district in question (3 Vict. c. 65; 8 Vict. c. 8, Jamaica statutes). Thus, therefore, the prisoner being arrested, it was not only lawful but necessary to send him into that district, quite independently of the question whether, when there, he should be tried at common law or by martial law, which question could not possibly, therefore, be affected by his custody, whether legal or illegal.

(*a*) As already seen, it would be for the military Commanders to determine whether they could or ought, according to the usages of the service, and their understanding of military law or the custom of war in like cases, try a prisoner by court-martial. Whether martial law could be declared would be a question of law, and is here assumed. Whether it ought to be declared or continued would be a question of policy or necessity for the Governor, and is here assumed. But assuming martial law, whatever it is, in lawful existence, then *what* it is, as it is entirely a matter of military usage and understanding, must be determined by the military authorities, and especially it would be for them to decide whether such or such charges came within their cognizance as military offences, and accordingly, it has been seen, they *did* decide all such questions (*vide ante*, p. 217). And so

that question to them, supposing any necessity existed, or was honestly believed to exist, for his immediate trial: that is to say, whether there was a charge against him cognizable by court-martial, under martial law, in regard either to its own nature, as connected with the rebellion, or to the locality in which the act had been committed, or to the time at which it was committed, and whether there was evidence sufficient to sustain such a charge; and if so, then it would be lawful for them—supposing there was any evidence to sustain such a charge, *i. e.*, of complicity in, or having caused the rebellion—to try the prisoner by court-martial, the court being constituted, as nearly as possible, according to the Articles of War, in respect of soldiers in like cases.

It is hardly necessary to observe, after what has already been remarked upon that head, that, if the rebellion had been not merely stopped, but entirely subdued and suppressed (*a*), the trial of any case by court-martial would of

it was in the case in question. Thus, evidence of General Nelson: "I received G. W. Gordon on the 20th of October; he was landed from the Wolverine, and then placed *under my charge;* received no instructions whatever, except that I received a box of documents; when I went on board I was instructed by his Excellency the Governor to examine the mass of papers, and, *if I found sufficient evidence, to have him tried;* went ashore; went through the papers, and selected them; the court-martial was to assemble under my orders; *I* framed the charges; the proceedings were sent to *me* for confirmation." So he stated in his letter to the Commander-in-chief, "After six hours' search into the documents connected with the case of G. W. Gordon, I found that I had *sufficient evidence to warrant my directing his trial. I prepared a draft charge and précis of evidence* for the court." It may be observed here, that the course of military law in such cases interposes an insuperable obstacle to anything like conspiracy to destroy a man, or the sacrifice of a man to local prejudice or enmity, and one might have supposed would have been a sufficient security against the *imputation* of anything so abominable. For, in the first place, it rested with the military Commanders whether the man should be tried, and in the next place the sentence would be nought unless confirmed by the Commander-in-chief as well as the Governor. And it would never happen that those three parties should be in collusion.

(*a*) The Governor, in the particular case alluded to, had a day or two

necessity be improper. So, of course, à multo fortiori, the trial of a case of constructive treason or presumptive criminality would be at all events improper. But, on the other hand, if the armed resistance or attacks upon the Queen's forces, or the loyal subjects in the field, were still going on at the very time the trial was proceeding, it could hardly be considered that the rebellion was so entirely subdued as to bring the case so clearly within this principle as

before the trial, which was on the 21st October, written a despatch, stating that the rebellion appeared to be subdued (though in other passages he spoke of it as still smouldering), but this was written upon the then state of his knowledge and without full knowledge of facts which had taken place, and of course without means of foreseeing things which afterwards took place, or which were taking place at a distance. On the 17th Oct. a proclamation or circular letter, signed by the ringleaders, was found (Ev. of Oxley), proclaiming a war of colour, and vehemently inciting the blacks to rise. On the 21st Oct. an armed body of rebels actually attacked the Queen's forces in the field (Ev. of Fyfe), and threatening and arming was going on in different parts of the island; while, on the other hand, the active ringleaders were still at large, and the reinforcements did not arrive until nearly ten days afterwards. The trial was on the 21st Oct., the execution on the 23rd. It was not until the 24th the active ringleaders were captured, and not till the 29th that the reinforcements arrived. Upon these facts the Royal Commissioners, of course, could not and would not report that at the time of the trial the rebellion was over, so that the trial was illegal or improper. On the contrary, the terms in which they reported on the subject implied quite the reverse, upon that point at all events. For after mentioning the armed attack on the 21st, they reported that on the 29th the reinforcements arrived, and on the 30th an amnesty was proclaimed; the Governor then stated that the ringleaders had met with the punishment due to their heinous offences, and that he certified that the inhabitants of the districts lately in rebellion were desirous to return to their allegiance. "*From this day, at any rate,* there could have been no necessity for that promptitude in the execution of the law, which almost precluded a calm inquiry into each man's guilt or innocence. Directions might and ought to have been given that courts-martial should discontinue their sittings; and the prisoners in custody should then have been handed over for trial by the ordinary tribunals." This necessarily implied that martial law, in its full force, *did* deprive them of these privileges, or, in other words, that the trials by court-martial were legal, and that up to the time mentioned they were not only not illegal but not improper. That is to say, that the trial of the supposed leader, nearly ten days *before* this time, was neither illegal nor improper. It is true that

to render the trial illegal; and its propriety would depend upon the degree of danger or of appearance of it still remaining, and the existence of reasonable grounds for apprehension of its renewal.

When the military Commander had determined that there was evidence to sustain a charge against the prisoner within their cognizance, it would be for him to frame the charge (*a*) and constitute the court, which he would do in accordance, as far as possible, with the analogies of military law in the like cases. The charge, in order to justify a capital sentence, would require to be one either of treason or of complicity in the crime of murder; and the former would require evidence of an intent to deprive the Crown

Cockburn, C. J., in his charge, spoke of the rebellion as over at the time of the trial, but if it were so, then all he said on the subject of martial law was obiter (for of course in any sense it would then have been illegal), and the statement is entirely at variance with the evidence and the Report of the Royal Commissioners.

(*a*) As already seen, when soldiers are tried for *civil* offences, as, for treason, as they may be under the Mutiny Act in a colony or foreign dependency where there is no civil judicature in force (*vide ante*, p. 209), the sentence can only be capital, if the crime would be so by ordinary law, as it is in treason or murder, and an armed attack upon loyal citizens or soldiers, certain to end in murder, would, of course, amount to murder. And by obvious analogy this would apply to courts-martial under martial law. Therefore, the charges in the case in question were framed with reference to this view of the law, and they comprised a charge of treason and a charge of complicity in an outbreak ending in murder. The charges were these: reciting that before the insurrection the prisoner did, in furtherance of the massacre at divers periods, incite and advise with certain of the insurgents, thereby, by his influence, tending to cause the riot, whereby many of Her Majesty's subjects lost their lives; the prisoner was charged 1, with high treason; 2, with having complicity with certain parties who were engaged in the rebellion, riot, or insurrection. That is, of course, as the recitals explained, by means of *incitement* before the rebellion broke out. The court-martial, in like manner, would be properly constituted by analogy to the Articles of War, as a detachment general court-martial may be constituted in a colony only of *three* officers of *either* service. And accordingly, in the case in question, the court was so constituted, as is conceived, with strict legality. The Lord Chief Justice, in his charge in Nelson's case, supposed otherwise, but he was obviously unaware of the provisions alluded to in the Articles of War.

of the colony; the latter would require, in order, at all events, to justify a capital sentence, proof of complicity in an armed attack upon the Queen's troops or loyal subjects calculated to lead to murder.

Assuming a court-martial lawfully and properly constituted according to the nearest analogies of military law, and assuming also a charge of an offence within its legal competence or cognizance, there would arise the question as to its procedure, and especially as to the proof of the charge, which divides itself into two questions, as to the nature of the evidence, and its sufficiency in amount. With regard to the procedure of courts-martial, in trials by court-martial, under martial law (*a*), as the declaration and

(*a*) In the case of *Grant* v. *Gould* (2 H. Blackstone, 6), it was formally and solemnly decided that even a regular court-martial is not bound by the rules of evidence which prevail in our courts of common law, and any one at all acquainted with law is well aware that those rules only bind courts which proceed according to the course of the common law. In that case a sergeant had been sentenced by regular court-martial, in time of peace, to receive a *thousand lashes*, and notwithstanding the horrible severity of the sentence, the court declined to hold that the court was bound by the common law rules of evidence. "That all common law courts (said Lord Loughborough) ought to proceed upon the general rule, viz., the best evidence that the *nature of the case will admit*, I perfectly agree. But that all other courts are in all cases to adopt all the distinctions that have been established and adopted in courts of common law, is rather a larger proposition than I choose directly to affirm," and accordingly upon that principle various irregularities, which undoubtedly would not have been allowed in a common law trial, were declared to be no sufficient grounds even for prohibiting the execution of the sentence, it not appearing that they had operated any substantial injury to the prisoner. There, however, the charge was specific, and the evidence adduced in support of it fully verified it (*ibid*). So in the case of Governor Wall (28 State Trials, 148), the defence being a summary trial by drumhead court-martial, Mr. Law (the late Lord Ellenborough) said, he admitted the validity of it if there was a mutiny, which it required the strong arm of power to suppress, and it was so dangerous in its probable and immediate consequences as to supersede the ordinary trial for such offences, and the Lord Chief Baron (Macdonald), in his summing up, adopted that view, and drumhead courts-martial are recognised in the books of military law. So in *Wright* v. *Fitzgerald*, 29 State Trials, 760, the judge said, "It is expected that in such cases there should be a grave and serious examination; *he did not mean that sort of*

execution of martial law can only be excused on the ground of an urgent necessity, and the presence of a great public peril, it is manifest that there cannot possibly be expected to be an observance of those mere *formal* rules of proof or of procedure, which, however ordinarily desirable and valuable as precautions and securities, are not necessarily of the essence and substance of justice, and the observance of which would involve so much delay or difficulty as to defeat the paramount object for which martial law is proclaimed. But, on the other hand, it is equally obvious, that the more substantial rules and principles of evidence ought, as far as possible, to be observed. The broad rules of common law and military law require that there should be a specific charge and sufficient evidence; and especially where the sentences are capital, the sanctity of human life—which always demands the gravest consideration—requires that there should, at all events, be a charge of an offence cognizable and capitally punishable under martial law, and that there should be an adequate amount of evidence of it, and a most careful consideration of its effect.

The common law (*a*), the ordinary municipal law of the country, is extremely strict in its procedure in all cases affecting life or liberty, and requires the most exact and accurate accordance between the allegation of the offence and its proof in evidence; and sometimes this strictness

trial which took place at common law, but the best that the nature of the case and the circumstances will allow of." But in that case there was *no capital offence* (as the sentence itself showed), and the man was in effect sentenced to death under pretence of corporal punishment.

(*a*) "The scope of the common law on criminal questions, is the vindication of the law in ordinary times and under ordinary circumstances. And in time of peace the courts can afford to be *strict, critical, and technical* in the definition of offences, or the proof of them as law, which sometimes lead to miscarriage of justice" (*Treatise on Martial Law*). Alluding to such cases as that of Horne Tooke, where it was said, by Lord Mansfield, "An indictment or information must charge what in law constitutes the crime with such certainty as must be proved, though that certainty may arise

has been considered by great judges as reflecting some scandal on our law, as causing miscarriage of justice. But everyone must feel that the error is on the right side, and that it is possible to catch the spirit and carry out the principle of the common law on the subject without adhering to its more formal and technical rules. And that spirit and principle appear to dictate the *gravest care* and *consideration* in dealing with human life or limb; and it is obvious that, under martial law, there is all the greater necessity for this care and consideration, for the very rea-

from necessary inference. *Whatever the degree of guilt may be*—however strongly it may be proved—yet if the defendant is entitled to a legal advantage, even from a *literal flaw*, God forbid that he should not have the benefit of it" (*Re Horne*, Cowper's Rep. 655). Numerous illustrations of this could be given from the books of our law; but it is to be observed that in the most extreme instances they do but exhibit an excess of care on the right side, viz., in favour of human life or liberty, and the spirit and principle of the common law may be caught, although its technical rules may not bind the above, and similar cases had been cited by the Author, and it was to such cases he alluded when he wrote the above passages, which are in entire accordance with what has been laid down by the courts in various cases. Thus, in *Grant* v. *Gould*, 2 H. Bl. 96, it was said, that it would be absurd to expect as much precision in a sentence by court-martial, even *regular* court-martial, as in a conviction before a magistrate (2 H. Blackstone, 107). So the Court of Queen's Bench, in considering the sentence even of a regular court-martial abroad, said: "The natural tendency of our minds is in favour of prisoners, and in the mild manner in which the laws of this country are executed, it has been rather made a subject of complaint by some, that the judges have given way too easily to mere formal objections on behalf of prisoners. We must, however, take care not too urge this disposition too far, lest we loosen the bonds of society, which are kept together by the hope of reward and the fear of punishment. It has always been considered that the judges in our foreign possessions abroad are not bound by the rules of proceedings in our courts here. On appeals from our colonies, no formal objections are attended to, if the substance of the matter or the corpus delicti sufficiently appears, to enable them to get at the truth and justice of the case (Lord Kenyon, C. J., *Rex* v. *Suddis*, 1 East's Rep. 314). "We are not now sitting as a court of error to review the regularity of the proceedings, *nor are we to hunt after possible objections*" (*ibid*). The spirit and effect of these judicial observations is, that on trials, even by regular courts-martial, the substance of justice is to be looked to rather than its forms, and in that spirit the Author wrote in his former book, in passages which were very much misapprehended.

son that it is necessarily administered amidst great excitement, and without the safeguards of these formal rules. And no emergency can dispense with substantial rules, which require sufficient evidence of the offence, and of an offence of which the tribunal can take cognizance, and an offence capitally or corporally punishable. It is hardly necessary to add that there must be a fair hearing and a reasonable opportunity for answer and defence. But it is obvious that, if there be an observance by courts-martial, under martial law, of these substantial rules, the non-observance of the more formal or technical rules of procedure, which cannot be applicable to such exceptional tribunals, with such an irregular procedure, can work no substantial injury or injustice to the accused. And it should never be forgotten that the object of trials by court-martial is justice, though rough and summary justice, and that no theory can justify the disregard of those substantial rules of that justice which is the object; though, on the other hand, there are occasions when the mere forms of justice must not be allowed to defeat that object, and the end must not be sacrificed to the means.

Courts-martial have been called courts of natural procedure (*a*), and are bound rather by the rules of natural

(*a*) This is the description given of them by Bentham, in his *Rationale of Judicial Evidence*, because they are not bound by mere formal rule; and Mill, in his *History of India*, in his first edition, had a chapter directed against the artificial rules of our law of evidence. It should, however, be borne in mind that these observations apply only to such artificial rules as excluded evidence reasonably admissible, or required evidence not reasonably obtainable (many of which rules have since been removed by legislation), and that they imply and assume that there is and ought to be evidence reasonably sufficient. As a general rule, there must be express evidence of facts which are to form the basis of a verdict, though from facts proved the jury may draw inferences or presumptions, and this substantial rule applies equally to courts-martial (*Hunter* v. *Gibson*, 2 Hen. Blackst. 187; *Grant* v. *Gould*, *ibid*, 68; *Rex* v. *Burdett*, 4 B. & Ald. Rep.). The only qualification is, that juries may judge of the proof by the light of their own general knowledge (*Rushforth* v. *Hadfield*, 7 East's Rep. 224); and that they do not require express proof of public notorious facts. At all

good sense and justice than by formal or artificial rules; but it should be carefully borne in mind that it is a dictate of natural good sense and justice, especially under circumstances of heat, of haste, and excitement, which require a greater degree of care, that there should be an observance of those substantial rules which experience and good sense in this country have caused to be established in our regular courts as safeguards and securities, especially in cases which affect life or limb.

So of the cardinal principle, founded equally on natural good sense and experience, that the best evidence which can reasonably be expected to be produced should be produced; and the two great rules (*a*) deduced therefrom, that

events, though it is the practice to require express evidence of particular facts, it is by no means quite certain how far they may not draw on their own knowledge of facts, public and notorious, *as a war or rebellion*, and the like, or how far the court may take judicial notice of such public facts. In *The King* v. *Sutton*, 4 M. & S. Rep. 536, a case of indictment for sedition, the royal proclamation was put in evidence, to show that a system of outrage had existed, which, it was suggested, the libel tended to incite to, and it was admitted as an act of the State, founded on the existence of the outrages it recited; and preambles to Acts of Parliament, also reciting them, were admitted as *tending to show the notoriety* of their existence. In the course of the summing up, the judge alluded to the personal knowledge of the jury, as illustrating this evidence; and this was held not improper, because it formed "a part of the history of the country that such outrages had been committed;" and "it was as if he had said, every one must be aware of what has passed before their own eyes, and at their own doors; and though it was added that he did not advise them to rely on it as a source of information, on which they were to found their verdict, it would be contrary to sense that a court, which is both judge and jury, and is trying a case summarily, should stand out for formal proof of notorious and public facts. The courts of law may take cognizance of acts of State, and public and notorious facts, such as a war (*The King* v. *De Beranger*, 3 M. & S. rep. 69). Thus, a court-martial, in time of rebellion, would hardly be expected to require express and formal proof of the *fact of the rebellion*, and though, in a criminal court, nothing can be taken, without such proof, it would be too much to say that this strict rule would apply, in a trial by court-martial, to facts which no one doubts, and which are not denied, and which are open and notorious.

(*a*) These rules were carried out so rigidly at common law as to produce inconveniences, which were removed either by exceptions introduced by

matters of fact should be proved by witnesses produced and examined in the presence of the accused as to facts they have seen and heard, and that matters in writing should be proved, if possible, by the production of the writing itself. And although, as these rules may be sometimes difficult of application, so as to perplex our judges in our common law courts, and have been carried to excesses of refinement, which have, in some instances, required legislative correction, and their disregard does not necessarily involve injustice; yet, it is obvious that they embody principles of sound sense which ought never, in substance, wilfully to be departed from.

the courts or by legislative enactment. Thus, for example, to prove the state of a man's account at a bank, it would strictly be requisite to call *any* clerk who could possibly have received money, that is, all the clerks in the bank, and in order to avoid this monstrous inconvenience the courts allowed the fact to be proved by the ledger (*Furness* v. *Cope*, 5 Bingham's Rep. 114). Again, the rule which required an attesting witness should be called to prove the execution of a document was, as Lord Ellenborough said, "as fixed, formal, and universal, as any in the law," yet it was absolutely necessary in some cases to introduce exceptions, provided the execution was fully and satisfactorily proved, as it might be, by other evidence; and, at last, the rule was got rid of in civil cases by the Common Law Procedure Act, 1854, but it remains in criminal cases. So as to the rule which requires the production of a document, if it be in existence, to prove its contents, so salutary as a general rule, though it often works injustice. "Our ancestors were wise in making it a rule that in all cases the best evidence that could be had should be produced, and great writers on the law of evidence say, that if the best evidence be kept back, it raises a suspicion that if produced it would falsify the secondary evidence on which the party has rested his case" (Best, C. J., *Strother* v. *Barr*, 5 Bingham's Rep. 151). The very reason of the rule, indeed, implies that if it is made clear that the best evidence is not kept back, and the fact is clearly proved, the principle of the rule does not apply, but it is safe to adhere to a general rule, though in some cases there is great difficulty in its application. Though, however, the substantial sense and reason of the rules are easily intelligible, their application may be difficult. Thus, for instance, in a case where the judges were divided, it was said, "Suppose it be found under an indictment for treason that arms and treasonable papers are found in a house, to prove that it was in the occupation of the prisoner the landlord is called, who proves that the prisoner took the house of him and *paid him rent*, and upon this he is asked if he did not let his house by a lease in writing, and he

And there is one plain, broad, and substantial rule, of such obvious sense and justice that it not only can never be safely disregarded, but it can never be disregarded without a grave degree of culpability; viz., that men must not be convicted upon the strength of evidence *taken behind their backs*, and produced merely in the form of written depositions, not taken in the presence of the prisoner, and the witnesses themselves being kept back, or, at all events, not produced in court for examination and cross-examination in his presence (*a*).

answers that he did; and suppose the objection taken for the prisoner, that it ought to be produced, the judge answers that the tenancy may be proved by payment of rent. Again, a gunsmith proves that the prisoner bought arms of him, and that he sent them to his house, and that a person who appeared to be the tenant and resembled the prisoner paid for them. He is asked if the order was in writing, and he says it was; he is asked whether he ever had before seen the person who appeared to be the prisoner, and he says he had not. Then an objection is made that the order should be produced The judge says, the arms are sent to a house of which the prisoner is tenant, and were paid for by a person who appeared to be occupier, and that this is evidence from which the jury may infer that the prisoner was the person who bought the arms. The prisoner is convicted, and on further enquiry the lease and letter are produced, and it appears that the lease was to the prisoner's brother, and the order signed by him; would any judge venture to induce the King to execute a prisoner under such circumstances?" (Lord Chief Justice Best, *Strother* v. *Barr*, 5 Bingham's Rep. 155). That case, in which the judges were equally divided as to the application of a rule of evidence which they all agreed was "*essential to the security of life*," may illustrate at once the importance of these great rules and the great difficulty which may occasionally arise in their application.

(*a*) Though, as it is the practice of foreign countries to use depositions thus taken, it may be too much to say that it is necessarily contrary to natural justice; it is so contrary to our own practice, and is so open to obvious danger, that though it may be going too far to say that the use of a deposition would necessarily be a violation of justice, or invalidate the proceedings, or involve any grave culpability, it may safely be said that this *would* be so, if such evidence constituted the *only* evidence, or if the accused were convicted on the strength of such evidence. This was what the Author meant to convey in his former work, which was written mainly with a view to criminal culpability on the part of the members of the court-martial. The *true principle* is stated above. Thus the Royal Commission, in the Jamaica case, carefully drew a distinction between

And as courts-martial are at once judges and jurors—that is to say, have to judge of the quality and character of

cases in which affidavits and depositions formed the only evidence, and cases in which depositions were only received. Thus they stated, "that at a certain place affidavits were regularly received as proof of the facts deposed to, and in some cases, in which death was the sentence, the affidavits *constituted the only evidence.*" So they state, "three persons were convicted and executed upon the production and proof of affidavits *made behind their backs*, by persons who, for anything that appears, might perfectly well have given their evidence in open court" (*Report of Royal Commission*). It is needless to say how monstrous these cases must be considered. They were, it will be observed, cases in which witnesses *were not produced at all*, and the only evidence was evidence taken *behind the backs of the prisoners*. There is, it is obvious, a great distinction between such cases and cases in which the witness is produced, although his deposition is also read, or in which other witnesses are produced, whose evidence, more or less, tends to support the case. The degree of culpability, it is manifest, because the degree of danger and of mischief, depends on the degree to which the objectionable evidence is relied on. But the character of such evidence is essentially vicious, and it cannot be safely or properly relied on at all. This is said of depositions taken *behind the back of the prisoner*, and depositions of witnesses *not produced*. The law of England allows depositions even in criminal cases, if taken in the prisoner's presence, and the witnesses are unable to attend. In foreign countries depositions are admissible, although not taken in his presence; as stated by Mr. Fitzjames Stephen, in his interesting *View of the Criminal Law* (p. 164); but that is obviously open to grave objection, and in this country, if the deposition is to be used as evidence, it is an inflexible rule that it must have been taken in the prisoner's presence. If, however, it is not to be used as evidence, it is otherwise, if the witness is produced in court and examined, and the deposition is merely produced, with any other statement of his, to check him, or furnish material for examination, and it is not as though it were used in evidence. In Gordon's case, in the Jamaica rebellion, there was strictly legal evidence; there were depositions by parties as evidence, which were taken behind the prisoner's back, and were made by witnesses not produced, and there were also depositions read by witnesses who were produced, probably to check their evidence. It was the former as to which the Royal Commission truly stated, that "the written statements of these persons had been taken in the absence of Mr. Gordon, and were inadmissible as proofs against him, according to the rules that regulate evidence in English courts, either civil or military." Thus, they added, "with regard to the written statements of J. Anderson, James Gordon, and Elizabeth Jane Gough, they were not legal evidence, but those persons were called and examined." This, it is obvious, made all the difference, but the distinction

evidence, as well as its weight, force, or effect (*a*)—so it is to be fairly expected of them that, while, on the one hand, not held to a strict observance of mere formal or artificial rules, they shall not only adhere to the substantial rules of evidence, but also attend to all reasonable considerations, as to the credibility of witnesses, or the interest or influences which may possibly affect the value of their testimony, and the necessity for confirmatory evidence; and so as to con-

was not kept in mind by Chief Justice Cockburn, in the comments on the case in his charge in Nelson's case; and the Lord Chief Justice also forgot that the objectionable evidence was of the least importance in the case.

(*a*) In this respect they differ from common law courts, as other courts known to our law do. Thus, in the Ecclesiastical Court, the judge, a skilled lawyer, who receives the evidence, also judges of its weight and effect, which is quite contrary to the common law system, in which the jury are the sole judges of the effect of evidence when it is fit to be submitted to them on any objection. Hence there are many material differences betwen the two systems as to the admission of evidence, in a great degree arising from this most important difference between them: and in the common law system the examination of witnesses is oral and open, and subject to cross-examination before and by a popular tribunal, on which the common law system greatly relies for the eliciting of truth and detection of falsehood (per Coleridge, J.; *Wright* v. *Tatham*, 4 B. N. C. 501). This consideration, indeed, has a double bearing; on the one hand, as pointed out in that case, such courts may fairly be deemed to be emancipated from those more artificial rules of evidence which are deemed necessary on account of what judges have called the infirmity of trial by jury, as a popular tribunal, composed of persons taken at hazard from the general ranks of society, and generally persons not of much education (in criminal or common jury cases), whereas courts-martial are always composed of gentlemen of education; while, on the other hand, from that very circumstance, they may be reasonably expected to observe the more important and substantial rules of law as to evidence, and also those obvious considerations of good sense, as regards the effect of interest or influence on the mind of the witnesses, which judges always take care to point out to the attention of juries. Thus, by our law, an accomplice is an admissible witness, though his expectation of pardon depended upon the prisoner's conviction, and so an accessory is a competent witness against the principal, and the principal against the accessory, but the fact of the witness being an accomplice of necessity detracts very materially from his credibility, and it is always considered necessary, though in strict law not essential, to give other evidence confirmatory of the testimony (*Regina* v. *Hastings*, 7 Carrington's and Payne's Reports, 152). Hence it is obviously better,

siderations, not only with reference to credibility, but memory, accuracy, and other circumstances, especially in evidence as to words spoken by the accused, such as it is the practice of judges to recommend, whether or not matters of law, as of importance, for the guidance of juries in criminal cases.

While, therefore, it is laid down (*a*), both by military and legal authorities, that courts-martial, under martial

if possible, in a capital case, to avoid acting on it unless confirmed. The Royal Commission in the Jamaica case made comments on some of the cases, which it may be useful to record as warnings. "At another place the evidence allowed to be given was of a most objectionable description. A. gave evidence against B. of a confession made by the latter of his having assisted in a murder, and immediately afterwards was himself put upon his trial as an accessory to the same murder, and was convicted, upon the evidence of B., of a confession made to him, coupled with the affidavit of a person whose absence was not accounted for. Three persons were convicted and two were executed upon the evidence of a confession made by a man shortly before his execution, in which he stated that the prisoners had assisted in the murder for which he himself was about to suffer. Five persons were convicted on the unconfirmed testimony of a man himself just convicted and sentenced to death as a spy, and for having incited others to join in the rebellion, one of the persons so convicted having himself given evidence to prove the case against the spy." In such cases, it is obvious that, on the one hand, there may be danger of the witness trying to screen himself by throwing the guilt upon the prisoner; and, on the other hand, there may be danger of his seeking to revenge himself by convicting the person on whose testimony he himself has been condemned. It is, indeed, to be borne in mind that in such cases, as held long ago in the familiar case of an accomplice, the evidence is admissible, and may be sufficient. It was held, in Lord Mansfield's time, that a person who has been admitted witness for the Crown, may be afterwards tried for the same matter, and tried on the evidence of the party already convicted (*Rudd's case*), and it has been always a practice to admit a fellow prisoner as witness, either after his conviction or acquittal, as then he has lost his interest (*Regina* v. *Hughes*, 1 Denman's Crown Cases, 84), though not until then. Still the question will be, in substance, whether the evidence was confirmed; and in Winsor's case, one prisoner was allowed to give evidence against the other in a case of murder, and Chief Justice Cockburn, and all the judges, held that as there was other evidence, the prisoner convicted had sustained no substantial injustice, though it was clearly contrary to practice.

(*a*) Thus it has always been laid down by Judge Advocates-General

law, are not bound by fixed and formal rules, and have no settled and regular practice, like courts of common law, but, by their oaths, are bound to proceed according to their consciences and the custom of war in like cases; it is equally clear from the same authorities, and by the terms and real meaning of their oath, that conscience itself requires the observance of the obvious analogies, the broad principles, and the substantial rules, common to all law, regular, municipal, or military, and based upon experience,

when officially animadverting upon trials taking place under martial law. Thus in the Ceylon cases, the Judge Advocate-General, Sir D. Dundas, stated officially, there is no practice laid down for martial law (*vide ante*, p. 9). "There is no practice laid down as to how courts-martial are to be conducted under martial law, but, on the other hand, they should approximate as near as possible to the regular forms and course of justice, and the usage of the service, and should be conducted with as much humanity as the occasion will allow, according to the conscience and good judgment of those entrusted with its execution" (Ev. of Sir D. Dundas, before the Ceylon Committee). This quite agrees with what was said by the Lord Chief Baron in Governor Wall's case (28 Sta. Tri. 154). "If there was a mutiny, and such a court-martial as could be had, if there was reasonable notice to the man that he was charged, and if there was an opportunity given him of defending himself, and as much attention to his interest as the case would admit of, the defence would be made out." So as to drum-head courts-martial, he said: "they mean, that when the alarm is such, and the danger so great, that the regular mode of summoning courts-martial cannot be followed, so many officers as are upon the spot may be summoned together, but they are not to proceed altogether without any regard to the interests of the prisoner, though they may not proceed exactly according to the directions laid down in the Articles of War" (*ibid*). This again accords with the oaths of the members of courts-martial, which would be found according to the Articles of War or the Mutiny Act, and where any doubt shall arise which is not explained by the Articles of War, then according to their consciences, the best of their understanding, and the custom of war in such cases (Articles of War, 152). And it accords with the exposition of that oath given in *Simmons on Court-Martial*, or *MacArthur on Court-Martial*. The terms of this oath, however, may well be interpreted and explained by the language of the military text books and the Queen's Regulations. The former lay it down, that it is proper in regular courts-martial to follow, as far as possible, the common law rules of evidence; and the Queen's Regulations lay it down, that it is the duty of officers to take great care to qualify themselves for sitting on courts-martial, by attending such courts and observing their proceedings.

sound sense, and natural justice; and that, as far as possible, they should proceed in accordance with the spirit and principles of ordinary law.

The grand and all important rule, of course, is, that there should be a sufficient amount of evidence admissible according to these substantial rules and principles; that is to say, there ought to be *legal* evidence, and *enough* of it (*a*). Even assuming that the evidence is such as is properly admissible and reasonably credible, there will come the

(*a*) As observed in the Author's former work, there are all degrees of proof, from demonstration down to slight probability; and it need hardly be said that the latter can never be sufficient, and that the former never is required. There are many intermediate degrees, but it may be laid down as law that in a criminal case—and, above all, a capital case—the evidence should be such as to leave no reasonable doubt in the minds of reasonable men; and though a less degree of evidence may involve no criminality on the part of those who act on it, nor, perhaps, any legal culpability, it will certainly involve grave moral responsibility, and may entail undying self-reproach. In the Jamaica case, the Royal Commissioners reported, in several capital cases, that the evidence was, in their opinion, insufficient. Thus, in one case, that of Gordon, they reported that the evidence, oral and documentary, appeared to them to be wholly insufficient to establish the charge upon which the prisoner took his trial—that is, the twofold charge of complicity in treason and murder; and though it is obvious that their finding did not in the least affect the legal validity of the conviction (seeing that convictions constantly take place at the assizes on evidence which lawyers deem insufficient, and yet no one, on that account, doubts the legality of the sentences), it would be desirable to avoid the possibility of such reflections, and with that view to err on the right side, remembering that the parties are still liable to be tried in courts of law. In that case, as already mentioned, there was some evidence strictly and legally admissible—that of a prisoner—produced, and there was evidence legally inadmissible—as depositions taken behind the back of the accused; and what the Commissioners must be presumed to have meant was, that there was not enough of admissible evidence to sustain the charge in either aspect of it, both practically resolving themselves into complicity in the outbreak. The offence, to justify a capital sentence, must have been treason or murder, and the one would require proof of an intent to deprive the Crown of the colony, and the other would require proof of criminal liability for an outbreak or attack ending in murder. The Commissioners said, "We cannot see, in the evidence which has been adduced, any sufficient proof either of his complicity in the outbreak at Morant Bay, or of his having been a party to a general conspiracy against the Government." There is

question of its effect, and its *sufficiency* in point of *amount*, as to which it is of course impossible to lay down any definite rule (*a*); and all that can be laid down is a general rule or principle that the evidence ought to be such as may reasonably satisfy honest and sensible men, sincerely desirous to decide justly, and in a fair and dispassionate state of mind. The only rules of law on the subject are, that it is for the prosecution to make out their case against the prisoner; and that though evidence may be circumstantial,

some reason to suspect that the Commissioners were under the impression that to sustain the charge of treason, there must be proof of complicity in a general conspiracy, although complicity in a local conspiracy, with the *same general object, and certain to become general if it succeeded*, would equally have sustained the charge, and it is very observable that they cautiously abstained from negativing a sufficiency of evidence of complicity in the local conspiracy, the existence of which they affirmed, so that their special finding leaves the question wholly undecided, and their general finding was apparently given under an impression as to the law, or as to its application to the case, which, it is conceived, was erroneous. Then, as to the other charge—of complicity in a murderous outbreak—they appear to have conceived that it was necessary that there should be express proof of actual complicity in the outbreak; whereas, it is conceived that, on the well-known doctrine of law already alluded to, supposing it to be clearly made out that the prisoner had used language which he must have known was naturally calculated to incite to some such outbreak, he would be legally liable, although he might not have intended one on that precise day or occasion. But as to that, it would be necessary that the evidence should be *clear and conclusive*. And the evidence was, in substance (discarding what was not properly admissible), that the prisoner had, some time before, said to the active rebels that the whites were to die if the blacks did not get the back lands, and that, just before the outbreak, he had sent them a letter requiring them, on the occasion of the meeting at which it took place, to be "up and doing, and help themselves," &c., &c., which it was probable they would refer to and connect with the language previously used. But, then, *all turned on the real sense and meaning of that language*, as to which there was only one witness, who spoke as to words used months before, and which he might easily have mistaken, and the Commissioners no doubt meant that this evidence was not sufficient to sustain a capital charge.

(*a*) The Royal Commissioners, in their Report, said, "The number of executions by order of courts-martial appeared to us so large that it became very important to ascertain, as far as we were able, the principles upon which the members constituting the courts acted, and the sort of evidence upon which their decisions were pronounced. It would be unreasonable to expect

and need not be conclusive, in the sense of excluding all possible doubt, it must be such as to exclude all reasonable doubt. And, further, it may be laid down generally that courts-martial, under martial law, ought to deal only with very clear cases, and leave others to courts of law.

The amount of proof to be required necessarily much depends upon the view taken of the nature of the charge, and the requisites or elements of the offence (*a*); as to which, when it is not of the character of an open and overt

that in the circumstances under which these courts were assembled, there should be the same perfect regularity and adherence to technical rules which we are accustomed to witness in our tribunals; *but there are certain great principles which ought, under no circumstances, to be violated, and there is an amount of evidence which every tribunal should require before it pronounces a judgment which shall affect the life, liberty, or person of any human being.* In order to ascertain whether these principles have been adhered to, and whether, in all cases, this necessary evidence has been required, we have carefully read the notes of the evidence given before the different courts, upon which notes the confirmations of the sentence were pronounced. In the great majority of the cases the evidence seems to have been unobjectionable in character, and quite sufficient to justify the finding of the court. It is right also to state that the account given by the more trustworthy witnesses as to the manner and deportment of the members of the courts was decidedly favourable. But we think it right also to call attention to cases in which either the finding or the sentence was not justified by any evidence appearing on the face of the proceedings."

(*a*) Thus, for example, in the case of Gordon, on the charge of treason, proof would be necessary of an intention to deprive the Crown of the colony; although this would not require, as the Commissioners seem to have supposed, express proof of an actual and general conspiracy with that object, and it would be proved by evidence of the prisoner's complicity in a mere local outbreak, which, if successful, must, by reason of its inevitable tendency to spread with rapidity, have the same result; and this complicity again would not require express proof, but might be shown by acts and words, of which the natural result would be such an outbreak. It is undoubtedly true that this would require clear proof of language clearly calculated to have that effect, and which the prisoner, therefore, must be taken to have intended; but the Commissioners virtually found that fact, and though the evidence given of it may have been hardly reliable, that was for the Court, and they might well and honestly deem it so, though others as honestly, and, perhaps, more wisely, might deem it not so. And both as to its reliability and as to the natural result of such language, they might well and honestly, and even, it is conceived lawfully, use their

act, nice questions may arise—as, for instance, as to constructive treason or presumptive intent, or with reference to the distinction between a general and a particular intent—and the effect of proof necessarily so much depends upon the extent to which it may be interpreted or applied by the general knowledge of the tribunal, or the extent to which it might take cognizance of facts as general, public, and notorious, without express or formal proof; and these, again, are of themselves matters necessarily of some

general knowledge of notorious facts of a public and general nature—as, for instance, the contiguity of Hayti, and the condition of the black population, and *the necessary tendency of an insurrection of colour and of race to spread rapidly*. For of these general public and notorious facts the prisoner must be assumed to have been as well aware as any one else, and they had, it is obvious, an important bearing on his presumed intention, with reference especially to the charge of treason, and a bearing which the Commissioners wholly overlooked. And, assuming that they were wrong in the view of the law, which it is manifest lay at the basis of the finding, then that finding cannot be relied upon. To this, it may be added, that, as the Author observed in his former work, although depositions taken in the absence of the prisoner could not, per se, be properly relied upon, and the evidence as to the prisoner's allusion to Hayti was of that character, the Court might honestly, though erroneously, use that evidence, in accordance with their general knowledge of public and notorious facts, in confirmation of the other evidence, strictly and legally admissible, viz., that the prisoner had spoken at a meeting about the death of the whites, and had sent them a letter to be "up and doing;" also, it is to be added, that the prisoner *did not deny having made an allusion to Hayti*, although he denied it on the particular occasion, and, of course, the particular occasion would be very immaterial—the significance and importance lay in the allusion itself. And as it would be idle to say that the Court were not to use their general knowledge of the fact of history about Hayti, or the general knowledge of the notorious fact that there was an enormous black population in the colony; so it would surely be idle to say that they might not fairly draw an inference, *that a local outbreak, if successful, was certain to be general*, and another inference, that the prisoner must have been as well aware of it as anybody else. These observations show that the view taken of the proof to be required must depend upon the view taken of the law; and as the Author, after great consideration, ventures to differ from the Commissioners, in their implied or apparent view of the law—although it is very likely he may be wrong—yet this surely is sufficient to show that the Court might honestly, even although erroneously, have taken the view which appears to him to be the true one, viz., that if the prisoner used

uncertainty, that there must always be a great difficulty in conveying to the minds of others a just appreciation of the evidence on which the court may have convicted. And thus it may happen that in a case of a constructive rather than of active complicity, and of presumptive rather than of express proof, it might be, upon evidence on which a judge could advise a jury not to convict, but upon which, if their feelings were excited, they might possibly convict;—a court-martial might honestly enough convict, although others, in a different state of mind, and with a different degree of general knowledge, might honestly, and perhaps properly, consider the evidence as "wholly insufficient to sustain the charge."

And while, on the one hand, such a conclusion would not, it is conceived, necessarily involve any imputation upon the members of the court-martial who convicted upon such evidence, or upon the military Commander who confirmed their proceedings, nor upon the Governor who, after such confirmations, allowed and approved the execution of the sentence under a belief of its necessity; still it may well be deemed to convey a lesson of caution for the future; and it undoubtedly involves this, that as, in such cases, it is necessary for the purpose of justification, not merely to feel a conscientious conviction, but to carry that conviction to the minds of others, the very difficulty of doing so, in cases rather of constructive than active complicity, suggests that it is, as a rule, wiser, safer, and better

language calculated, as he must have known, to cause an outbreak, he was guilty of treason, and might also honestly, though erroneously, have arrived at the conclusion that he had used such language. On the other hand, others might honestly and rightly arrive at an opposite conclusion, and a judge, no doubt, would have advised an acquittal; but that would have been, partly because the law as to treason wisely requires two witnesses to words, and partly because our criminal law requires formal proof of almost all facts; and even although the judge might have advised an acquittal, a jury might, under honest though mistaken feelings, have convicted. Similar observations apply with stronger force to the second charge, of complicity in the crime of murder.

to avoid dealing with such cases under martial law (*a*); and that, as martial law is necessarily administered under circumstances of heat, haste, and excitement incident to a great emergency, and which, while they may *excuse* errors into which, under such circumstances, men may fall with perfect honesty, certainly expose them to greater risk of error; it is better to confine it to cases of a clear and simple character, and avoid others, except under the pressure of some unavoidable necessity.

(*a*) The two charges virtually reduced themselves into the same, in this respect, that neither was maintainable without showing a *constructive liability for the outbreak*. The Author designedly uses the word "liability" instead of "complicity," which he ventures to think may have suggested to the Commissioners the idea that express proof of an actual complicity was necessary, whereas, as he conceives it, it would be enough if it was *clearly* proved that the prisoner had used language to the actors in the outbreak which he must have known would be likely to cause some such outbreak. In his opinion this would be ample presumptive proof, according to authorities already quoted, that *he must have intended it*. If so, he would be guilty of the murders which took place on the occasion, because no one will dispute that they were the necessary consequences of the outbreak, so that if he intended the outbreak he intended *murder*. And no lawyer will pretend that an intent to kill a particular person is necessary to constitute the crime of murder, if there be clearly an intent to kill some one; added to which, no one will dispute that if there was here an intent to kill any one, it was an intent to kill the very persons who were killed, at all events, inter alia. An intent to kill a class to whom A. and B., belong is an intent to kill A. and B. And an intent to incite others to kill them is an intent to kill them. And language which must have been understood so to incite must have been so intended. This, no doubt, involves, as already observed, clear proof of language which must have been so understood, and must therefore, have been so intended; and as nothing is more dangerous than evidence of words used, for which reason our law wisely requires two witnesses in treason, any one may fairly think that a court-martial would act wisely in not convicting on evidence of words without the clear evidence of at least two respectable and credible witnesses, nor even then without circumstances of confirmation. And, of course, in such a case, a judge would have advised a jury to an acquittal upon *either* charge, but that would have been because, as to the law of treason, positive law absolutely would exclude a conviction; and as to the charge of murder, because as our judges always require conclusive proof, and this proof would be very far from conclusive, such a course would be in accordance with ordinary practice. But many things are in accordance with practice which are not strictly obligatory in law, as, for instance, requiring confirmation of the evidence of an

So careful is military law to compensate for the absence of the safeguards and securities of common law in trials by courts-martial, that, in order to secure a review of the evidence and the findings, at all events in capital cases, by superior authority (*a*), it requires that the proceedings shall be submitted to the highest accessible authorities; that is to say, not only to the General in command, but to the Commander-in-Chief of the colony or dependency, and to the Governor, so as to secure a review of the case by

accomplice. And notwithstanding the advice of the judge, it may be that a jury of a county in which a cruel massacre had taken place might, under the influence of honest though excited feeling, insist upon convicting. Nothing is more difficult than for men to separate in their minds facts proved before them from facts they already know as matter of notoriety, and it was found by the Commissioners that it was a matter of notoriety that the prisoner had for some time been engaged, along with the actors in the outbreak in using language calculated to excite to insurrection (*vide ante*, p. 228). And this affords a solution of the conclusion quite consistent with honesty, and, on the other hand, quite consistent with the insufficiency of the evidence. What lawyers would advise, under such circumstances, though useful for the purpose of future guidance, involves no imputation upon what has already been done by men acting honestly under great excitement and in a great emergency. In the Author's former book, written with reference to the past, he may have been somewhat unguarded as to the future, especially in writing with reference to cruel charges of murder against men who had thus acted. The Lord Chief Justice and others, on the other hand, apparently more anxious for the future, have perhaps fallen into the opposite error of doing some injustice as regards the past. It is the desire of the Author, in the present work, to unite both views, and show that it is quite possible to be candid and indulgent as to errors of the past, and yet stringent as regards the future.

(*a*) This was well illustrated in the most remarkable of the cases which occurred in the Jamaica rebellion, in the case of Gordon. The proceedings first came before the General in command of the district under martial law, who having approved, sent them to the Commander-in-Chief with a letter, which ran thus: "The President having transmitted the proceedings, I carefully perused them. The sentence was death. I considered it my duty fully to approve and confirm. I enclose the whole of the proceedings of the court for your information, as you may desire to see what evidence led to the conviction of so great a traitor. I have not furnished any report of the court to his Excellency the Governor, because, as his Excellency is now at Kingston, I apprehend all my reports should be made through you, my immediate commanding officer. Hoping, as heretofore,

several successive military authorities, and also by the supreme civil authority; and the sentence is not to be executed until approved and confirmed by all of them, thus ensuring, as much as possible, the concurrence of *separate* and *independent* opinion and responsibility before allowing the infliction of a capital penalty. And it is manifest that, as far as is *practicable*, the spirit and principle of military law in this respect applies not only equally, but à multo fortiori (at all events as regards the highest *accessible* authority) to capital convictions under martial law.

to gain your approval, I have the honour to be," &c. The whole proceedings of the court were enclosed for the General's information. These proceedings reached the General, who, after reading them to two members of the Executive Committee, forwarded them the same day to Governor Eyre, with a request that he would return them with as little delay as possible. These proceedings were returned to the General the same day by Governor Eyre, who wrote at the same time that he fully concurred in the justice of the sentence, and in the policy of carrying it into effect. The Commander-in-Chief transmitted, in letters to the Secretary of State for War and to the Military Secretary at the Horse Guards, a copy of General Nelson's despatch reporting the trial, sentence, and execution of Mr. Gordon, and in both letters he adds, "A copy of his Excellency the Governor's letter approving the same is enclosed, in which I fully coincide." This, it is to be observed, was the ordinary course under regular military law; which requires in capital cases the approval of the Commander-in-Chief of the colony and of the Governor (Queen's Regulations); and although under martial law, it may obviously not be possible always to wait for the approval of the Governor, who may be at a distance, it is always proper, by analogy, to ordinary military law, to have the approval of the Commander-in-Chief, who (as in the case of Jamaica), was much nearer, and had only military affairs to look to; whereas the Governor would have the affairs of the general Government to attend to, and would very likely be overwhelmed by the anxieties and alarms of the whole island. Where, however, it was practicable, the proceedings should be submitted to him, and in this instance they were so. And it is to be observed how carefully the course prescribed by military law provides not only the highest security for the prisoner, but also the best protection for those engaged in the suppression of rebellion, for the concurrence of authorities so separate and independent as the Commander-in-Chief and the Governor, afford the strongest possible safeguard, if not against error, at all events against anything like a combination to destroy a man, such as was indeed imputed in the case alluded to by some persons, who had not attended to this circumstance, of the con-

The approval of the sentence by the military Commanders, in such a case, might proceed rather upon analogies of military law, with reference to sedition in the army, the penalty for which by military law is capital. The approval by the Governor, as supreme civil ruler, would proceed probably rather upon the analogies of ordinary law, and

they observed, that large numbers of rebels—that is, of those who had been engaged in these acts of rapine—were lurking in the bushes around them. It was this which the Governor, at the first outbreak of the rebellion, dreaded and apprehended. And it is notorious that it is this phase of rebellion which has always proved most dangerous and difficult to vanquish. It has baffled us in New Zealand and Caffraria, and inflicted upon our forces the most severe and mortifying repulses; and the island afforded such facilities for this sort of warfare, that the insurgents might have held out long enough to cause great disasters. Numerous passages in the reports showed that the officers, for some time, continued to expect attacks from men in such positions. One of the officers received a challenge from the rebels that they were ready to meet the forces at a place where they said they had a fort from which they could "kill a hundred men coming one at a time," and from which, according to the evidence, armed men marched down to the scene of the outbreak. On the morning of the trial this officer sent a force against this fort, and they were actually attacked by the rebels, and though the rebels were scattered, and the fort was deserted, they had taken to the bush. So another officer reported, "As I passed through the villages, about 300 rebels rushed through the bush, armed with cutlasses" (Rep. of Adcock). The execution was sanctioned on the 22nd Oct., the actual occurrence of outrages did not cease until the execution of the ringleaders, about the 24th of October. The military reinforcements did not arrive until the 30th, and in the meantime the force was extremely weak, and becoming exhausted and worn out by fatigue. The authorities may have been right or wrong in their judgment upon that point; but the thing to be observed is, that they put it upon that ground, and mainly upon that ground. All through, it was put upon this,—that there were only 1,000 troops in the colony, and the executive committee urged that 2,000 more should be applied for (Parl. Pap. 21), so that, in their view, there was only one-third of the requisite number. This was urged as the reason for declaring martial law, and for retaining it until reinforcements arrived and were distributed, and there can be no doubt that it formed one of the main grounds for the execution of the person who, as the Commissioners reported, was universally regarded as the real leader of the rebellion. It is not for the Author, as a lawyer, to consider whether these grounds were or were not sufficient, but he is bound to point out that they existed, and might well enough at the moment have led the Governor to apprehend that the rebellion had reached its most critical and formidable phase.

would be based upon evidence of criminal liability (*a*) for acts or offences capital by that law, as treason or murder. As it is only such offences which are capital by ordinary law, even assuming the legality of the proceeding, its propriety could only be justified to the Crown by proof of such offences; and also by considerations of urgent necessity with reference to the safety of the colony; though, on the other hand, the proof might, if conclusive, be presumptive, and the necessity might reasonably be considered, not merely with reference to the continuance of armed resistance in the field, or acts of open rebellion, but with re-

Legal principle and moral justice equally dictate that in judging of the acts and conduct of a public officer under circumstances of great danger, the grounds on which he acted should be looked at, and should be looked at as much as possible as they appeared to him at the moment. And it is of great importance that it should be clearly understood how extreme and exceptional were the circumstances under which an execution in such a case was sanctioned.

(*a*) And accordingly it was upon these considerations it was justified. Thus, in the case referred to, the Governor, in his despatch to the Secretary of State announcing the execution, said:—"I have seen the proceedings of the Court, and concur both in the justice of the sentence, and in the policy of carrying it into effect. *It is absolutely necessary, for the future security of Jamaica*, that condign punishment should be inflicted upon those through whose seditious acts and language the rebellion has been originated. I enclose copies of the report from the General, and of my letter in reply." (Desp. of Mr. Eyre.) That letter ran thus:—"I have read the papers referred to, and I really concur in the justice of the sentence, and the policy of carrying it into effect. There can be little doubt, I think, *whatever Mr. Gordon's intentions may have been*, it is entirely due to his agitation, bad advice, and seditious language amongst the peasantry of this colony, that *the rebellion broke out, and the massacre of so many gentlemen took place.*" In that letter he wrote:—"I believe that, were condign punishment to fall only on the ignorant people, who have been misled into rebellion, and the educated coloured men, who led to that rebellion, were allowed to escape, a very unfortunate impression would be produced upon the public mind, which, in the present state of the colony, *might lead to very serious results.* It is only by making it plain to the entire population, that the guilty agitator and user of seditious language will meet the same punishment as the uneducated fools whom he misleads, that we can hope to check and put down the spirit of disloyalty and disaffection, already so rife in the land, and which may, at any moment, occasion in other parishes

ference rather to the continuance of the danger against which it is the object of martial law to guard—a danger arising, on the one hand, from the existence of the same spirit of rebellion; and, on the other hand, the same deficiency of military force; and therefore the same probability that at any moment the spirit of rebellion, although temporarily subdued, might again burst forth.

In such case the minister of the Crown would probably require, to justify the execution, proof of an offence which

outrages similar to those which have recently occurred." (Desp. of Mr. Eyre, 27th October.) It was supposed that the words, "whatever his intention may have been," meant that the man might be justly executed, though the rebellion was contrary to his intention, or not in accordance with it, nor within the scope of his words or acts, a monstrous conclusion, for which, it is conceived, there is no foundation. What was meant, it is to be presumed, was that, assuming the prisoner had used language, the natural effect of which was to incite to insurrection (as the Royal Commissioners in effect reported), it was to be presumed that he intended it; and it was not material whether he had intended that particular outbreak, or rather an outbreak on that particular occasion. So the Author understood, and it was in that sense, and in that spirit, he wrote, in various passages, which (perhaps from their being inaccurately written) have been quite misunderstood by the Lord Chief Justice in his charge in Nelson's case. What he meant was, as he conceives, sound law, viz., that a man must be taken to mean what he says, and to intend the natural consequences of his language; and that, therefore, assuming that the accused used language which he must have known would be understood to mean massacre, it would be quite immaterial whether he meant it to take place on a particular day. As the Author observed in his book, the insurgents might, in that respect, have acted precipitately; but, if he incited them to it, his legal liability would, it is conceived, be the same. This, however, would require clear and conclusive proof, as to which, *vide ante*. It is manifest that, rightly or wrongly, the Governor based his justification of the execution mainly upon the ground of an assumed *necessity* for the public safety, with reference to the entire suppression of the rebellion, the removal of the danger, and the restoration of peace and confidence. It has already been remarked, that a passage in the despatch, supposed to indicate that the rebellion was entirely over, because resistance was temporarily at an end, was, in the first place, misunderstood; and, in the next place, written in ignorance of facts which were taking place in distant parts of the colony. For, on the very day of the trial, the rebels had met the Queen's troops in the field (*vide ante*), and the active leaders were at large, doing their utmost to arouse the population to resistance. Taking, however, the whole tenor of the despatch, it indi-

deserved death according to ordinary law (*a*). And as, according to the law already explained, a person could not be capitally punishable under ordinary law, except for treason or rebellion, the proof of which would require an intent to deprive the Crown of the colony, and the latter would require a general intent to incite to murder, or at all events outrages likely to lead to murder, it would be natural that the minister of the Crown should require, in justification of the execution, proof of one or other of such crimes.

cated a deep sense of danger still pervading the colony; and, it is to be remembered, the reinforcements had not arrived, and did not arrive, until nearly ten days after the trial. And the Royal Commissioners reported that "in their opinion that was the date to be assigned for the cessation of trial by court-martial" (*vide ante*, p. 200). If that were so, as to the more ignorant tools and instruments of rebellion, it might not unreasonably be supposed to be as to the person believed to be the real author and leader of it.

(*a*) Thus, Mr. Secretary Cardwell, in his despatch to Governor Eyre (23rd Nov.), wrote thus: "In your letter to the Commander-in-Chief (*vide ante*, p. 256), you approve the execution of Gordon, which had taken place under the orders of the General, stating that you had little doubt that whatever Gordon's intentions might have been, the rebellion was entirely due to his seditious language. It is necessary that Her Majesty's Government should be, as speedily as possible, placed in a position to understand the proceedings, and that you should send me all the documents and evidence adverted to in your despatches. I wish to know whether your approval of Gordon's execution rested on evidence of his participation in the insurrection itself, or the actual resistance of authority, out of which it rose, or evidence of the lesser offence, of using seditious and inflammatory language, calculated, indeed, to produce resistance to authority and rebellion, but without proof of any deliberate design of producing that result. It is a matter of obvious remark, that Gordon was arrested at Kingston, to which martial law did not apply, and taken to Morant Bay, for trial under martial law. I desire, also, to see it clearly established, that he was not executed until crimes had been proved in evidence against him, which deserved death, and that the prompt infliction of capital punishment was necessary to rescue the colony from imminent danger, and from the horrors of a general and widespread insurrection, and the repetition elsewhere of such a slaughter of the white and coloured colonists, as had taken place in the eastern parts of the land." Although at first sight some parts of this despatch might appear to imply that there must be some proof of the intent apart from the words themselves, yet upon examination this will not be found to be the meaning; and if it were, it would be clearly

For although, by military law, a soldier is liable to be capitally punished for sedition or mutiny, that is on account of the extreme peril arising from mutiny or sedition among armed men. And although no doubt the offence of inciting armed men to rebellion might not unreasonably be deemed to deserve a similar penalty, provided the offence were clearly proved; yet, on the other hand as, by analogy to the provisions of the Mutiny Act, under which a soldier is not to be capitally punished for a civil offence, unless it be capital by ordinary law, it might be considered that principle should be applied under martial law in time of rebellion, and this would require proof of an intent to incite to treason or murder.

If the offence were in its nature rather constructive than actual, or at all events active, and the proof rather presumptive than express, or positive, the justification of the

contrary, as already shown, to an established doctrine of law, under which *men must be taken to mean what they say*, and therefore, if, as was clearly proved, the prisoner had used language which might have been understood as inciting to murder or to armed attack certain to lead to it, the only question would be, whether it was so obviously certain to be so understood that it must have been *meant* to be so understood. What the Secretary of State meant, it is manifest, was, that if the case were rested entirely or mainly upon this presumptive intent, it must at all events be plain and beyond doubt, and that if not quite so plain and beyond a doubt, the excuse for the execution must be sought in some other circumstances confirmatory of it, and also, and above all, in the existence of an urgent necessity for the execution. It cannot be supposed that the Secretary of State meant that although the prisoner had used language which he must have *known* was certain or likely to produce murder, he would not be deserving of death either at common law or by martial law, without any other proof of intention other than the necessary meaning of the words. What he desired to have shown was that this was so. And it is obvious, that his attention had not been directed to the two main pieces of evidence against the prisoner, viz., that not long before the outbreak he had said to the active leaders, that if the blacks did not get the back lands the whites must be slain, and that a few days before the outbreak, he sent them a copy of a letter telling them to be "up and doing." The evidence, it should be observed, was obscure, because couched in negro dialect, and this may have led the Secretary of State and the Royal Commissioners wholly to overlook this the most important part of it.

execution would rest mainly on necessity, as to which there would be a great opening for difference of opinion, which might be more or less influenced by the natural aversion to such species of proof. And the condemnation of such an execution (*a*), if condemned it should be, though it might proceed both either upon the assumption that the evidence was wholly insufficient to sustain a charge of an offence capital by ordinary law, or that there was no urgent necessity for the execution arising from any existing emergency or imminent danger to the public safety, or partly upon both grounds, would proceed upon a difference of judgment on a matter of opinion. And the very condemnation upon such grounds would imply that, although there might be error, and some degree of liability to censure for erroneous opinion, there could be no serious culpability, and it would also imply that if there were sufficient evidence of such an

(*a*) The Royal Commissioners, in the case referred to, after an elaborate review of the case (in which they avoided any allusion to the main evidence against the accused), pronounced that, in their opinion, the evidence was wholly insufficient to sustain the charge, *i. e.*, the charge of a capital offence, either treason or incitement to murder. For the reason already given, it is not so easy to account for this finding on the other charge, and, as already observed, the main evidence was not noticed. However, such having been the finding of the Royal Commission, the Secretary of State followed it, and wrote his opinion upon the case thus: "The Government concur in the conclusion arrived at. The Governor concurred in the justice of the sentence and the policy of carrying it into effect, recording it as absolutely necessary for the future security of Jamaica, that condign punishment should be inflicted on those through whose seditious acts and language the rebellion originated. But it is evident that such considerations ought to be admitted with great hesitation. If lightly adopted, they would be liable to great abuse, and cases like the present, instead of being regarded as warnings, might become precedents for future action. In the present case, the necessity of the course adopted has not been proved. Considerations of public safety justified the arrest of Mr. Gordon and his removal, but his trial by court-martial and his execution by virtue of the sentence of that court are events which the Government cannot but deplore and condemn" (Desp. of Mr. Cardwell, 18 June, 1866). That is to say, although in the opinion of the Commissioners trials by courts-martial did not become improper *until ten days after*. It is not clear whether the view of the Secretary of State proceeded upon the ground that the prisoner

offence, and if there were such a necessity arising from such an emergency and such a danger to public safety, both which would necessarily be more or less matters of opinion, the execution would be not only legal but justifiable. It is obvious that such a case must be extreme and exceptional, and, in any view of it, more likely to prove a warning than a precedent.

As already mentioned, it appears to have been the opinion of the legislature, and, therefore, is the wiser and better course, not as a general rule to inflict capital punishment under martial law, except in cases capital by the ordinary law. But the same view does not appear to have been taken by the legislature as to the infliction of corporal punishments (*a*) for acts not merely of open participation in

ought not to have been tried by court-martial at all, because there was no necessity for such a course, or because there was not sufficient evidence. On the former view, his opinion was not consistent with that of the Commissioners; on the other view, it is obvious that it proceeded, as theirs did, on the ground that there had been no language used, the natural result of which was to incite to an outbreak likely to end in murder, a view not easy to reconcile with the evidence, and, accordingly, Cockburn, C. J., who adopts it in his charge, scarcely notices the main evidence in the case. But, at all events, such were the grounds for the opinion and the decision of the Secretary of State, and it is obvious that they implied that had the evidence been sufficient on that point, and the public danger more imminent, the execution would have been justifiable. And neither he nor the Commissioners suggested that it was illegal. Whatever view may be entertained of this case, it is abundantly manifest that it was one extreme and exceptional, and could scarcely, in any view, be drawn into a precedent, for it could only apply in the case of a person universally regarded as the real author of a bloody rebellion, and proved to have used language shortly before it at all events likely to cause it, and which he must have known was so. In any view the case is more likely to prove a warning than a precedent.

(*a*) *Vide ante*, p. 99. It is only if the offence is capital, by the ordinary law, that death is to be inflicted, but otherwise it may be any punishment, provided it is not in its nature contrary to the usages of English law, which of course excludes any torture. But flogging can hardly be said to be contrary to the usages of our law, seeing that it is applied by the Mutiny Acts even to the punishment of mere offences against discipline, and by statutes it has been applied to acts of rebellion or tending to rebellion (*vide ante*, p. 137). Nevertheless, there are obvious considerations pointing to the

actual rebellion which might be deemed capital, and in which, therefore, the infliction of corporal punishment might be comparatively merciful; but even acts of inchoate rebellion, or acts of preparation for it, such as arming or obtaining arms, &c. And as the loyal subjects of the Crown are, on the principle of expediency, with a view to the public safety, subject to corporal punishment, even for breaches of discipline, it naturally has not been deemed by the legislature unreasonable or unfair that disloyal subjects detected in acts of rebellion, or tending to rebellion, should be liable to such punishment. Nevertheless, there are obvious considerations, certain to be recognized by a wise and judicious Governor, pointing to the restriction of this species of punishment, and as much as possible limiting it to cases of personal violence, analogous to such as even by ordinary law are deemed to merit it.

limitation of this punishment under martial law, considerations both of policy and humanity not likely to be lost sight of by a wise and judicious Governor or military Commander, and accordingly, in the Jamaica case, the Governor very early sent an instruction to the Commander that he thought flogging should not be inflicted frequently (*vide ante*, p. 213). It afterwards turned out that it was inflicted far too frequently, but this was contrary to his instructions, which he might presume were carried out, and was to be ascribed to unhappy animosities of class and race. Moreover, he promptly punished a magistrate who had exceeded in this respect, and doubtless would have imposed penalties had he not been superseded by a Commission of Enquiry (Ev. of Mr. Eyre). And those who uttered wholesale reprobation upon the practice were not aware of the precedent set by the Imperial Legislature, nor of the direction which had been laid down to limit the punishment as much as possible. Moreover, there is reason to believe that what the Royal Commissioners denounced as a wholesale infliction of the punishment, arose partly from a natural error which may here be pointed out, that the possession of plunder was sufficient evidence of participation in the rebellion. It was, according to a well-known rule, presumptive proof of larceny or guilty receiving, or, if there had been a robbery, of participation in that robbery. In burglary and highway robbery, if a person is found in possession of the goods recently after the crime, we presume the possessor guilty unless he can account for the possession (*Rex* v. *Burdett*, 4 Barnwall's and Alderson's Reports, 115). And if there were a murder accompanying the burglary or robbery, the possession might, *with other circumstances*, be evidence of participation in that

It has already been seen that the Crown will hold the Governor responsible for a general direction and control of the execution of martial law. But it is obvious that, as it is in its nature military power and military rule, probably exercised at a considerable distance, and with great difficulties of communication, this control and direction can only be general, and that the immediate direction must be under the General in command of the district and the General Commanding-in-Chief. The Governor can only issue general directions or instructions to them, and of the manner in which these directions or instructions are carried out, he can only be informed by means of reports (*a*), which

crime (*Regina* v. *White*, 4 Finlason's Crown & Nisi Prius Reports, 383, and *Regina* v. *Exall*, *ibid.* 933, where the doctrine is fully expounded). But the mere possession of plunder *not* known to have been the produce of robbery with violence, only proves a larceny, or, what is equivalent, a guilty receiving. Hence it follows, on the above principle, that persons in time of rebellion should not be capitally or corporeally punished for the mere possession of plunder, without the proof that it was the produce of acts of robbery with *force and numbers*, which can be fairly referred to a participation in the *rebellion*. There is reason to believe that the punishment was never inflicted by military orders or in accordance with orders of the military Commander, except in cases of possession of plunder, and the presumption was a natural one; but, as will be seen, it was fallacious, and it would have been better if the directions of the Governor had been carried out, which, although general in their terms, obviously meant that the punishment should be reserved for acts which were of the worser kind, *i. e.*, it is to be presumed, acts accompanied with evidence of robbery by force or terror of numbers, or personal violence or threats of it. It was, in such cases, only the military Commander ordered it, and the analogy of the military law as well as ordinary law appears to suggest this limitation.

(*a*) This was illustrated very remarkably in the Jamaica case. There the Governor issued at the outset general instructions, in the only way in which he could, and by such suggestions to the Commander-in-Chief, which, if they had been carried out, would have prevented any of the errors or excesses which afterwards occurred (*vide ante*, p. 213); they could only, however, be carried out by the military Commanders, for the nature of martial law is military authority, and, perhaps, no persons are so jealous or tenacious of their authority as military Commanders, a fact amply illustrated in the Jamaica case; and how far the intentions or instructions of the Governor were being carried out, as he might naturally presume they were, by the military officers, he could not ascertain, except by means

usually go to the Commander-in-Chief, and require a certain time for preparation and transmission; and even if he has time to give immediate attention to them, the brief period allowable for martial law may elapse before he has ascertained what has taken place throughout the disturbed district.

It might, but for recent events, have been deemed needless to point out that, as regards the responsibility, legal or moral, of a Governor or military Commander, for acts done under martial law, neither the one nor the other can reasonably be held responsible for acts done by others, and not by their personal direction, unless either in pursuance of general or special instructions (*a*). As regards the Governor,

of information to be afterwards acquired. Thus Mr. Secretary Cardwell wrote for information: "In reference to the proceedings generally, I am desirous to point to the main topics which, in the opinion of Her Majesty's Government, demand your report, &c.:—The number of persons tried, and of those sentenced by courts-martial, specifying the charge and sentence, and whether or not the sentence was executed, and under whose authority, and whether minutes were taken of the evidence on which the sentence was founded in each case; all minutes of evidence so taken to be appended to the return; and whereby any and what oral or written instructions were given to officers in command of detachments sent in pursuit of rebels, whether they might know on what evidence or appearances, other than hostile action or attitude, they were to assume that those they might meet with were rebels." It is manifest that all these matters primarily rested with the military Commanders.

(*a*) It is a general principle, which is so founded on natural justice, that it may almost be deemed a principle of morality, as well as of law, that, as on the one hand, men may fairly be held liable for acts they have caused, or even allowed; so, on the other hand, they cannot fairly be deemed liable for acts even of persons under their control, not in accordance with, but contrary to, their own orders and directions. And it is obvious that all general orders and directions must be reasonably construed, subject to all conditions and limitations imposed by usage, or obligations common to and understood by other parties. Upon this principle, a master or superior is responsible for acts done in carrying out general instructions, or in the course of an employment, such acts being naturally incident to or necessarily involved therein, but not for acts wilfully done in departure therefrom, and not in the course of employment. Thus, for instance, an employer is held liable to a revenue information for frauds committed by the servant in the course of an employment to which such frauds are

as martial law is military rule, and that is under military discipline and authority, so the declaration of martial law, and the delegation to a military Commander of the authority and power to execute it, means its execution with due humanity and discretion, and subject to all the restraints of military discipline, and according to the usages of the service. And in like manner, as regards the military Commander, to whom the duty of carrying out martial law is thus delegated, his general directions to the officers under him to do so, must be understood as having a similar meaning; and as neither the one nor the other can be deemed to have sanctioned acts departing from these conditions, so neither the one nor the other can fairly be held liable for violation of their instructions, until it can be shown that *after knowing of them* they tacitly sanctioned or approved.

incident, as the employer is aware of such, and derives the advantage (*Attorney-General* v. *Siddons*, 1 Compton's & Jervis Reports, 226), for then the act is done in pursuance of a general purpose which the servant was authorised to carry out (*ibid, et vide Regina* v. *Dean*, 12 Meeson & Welsby's Exchequer Reports, 226). But it is equally well settled that an employer is never liable for a wilful act of his servant, not in the course of his employment, and not within the range of his general directions; and upon this principle, so just and so equitable, it has been held that a party giving another into custody of an officer is responsible for everything done by the officer in the ordinary course and performance of his duty, but that such responsibility does not attach in the case of any irregular or unnecessarily harsh treatment of the prisoner by the officer (*Edgell* v. *Francis*, 1 Manning & Granger's Reports, 222). The application of this principle to the case of a Governor or military Commander, in the exercise of a discretionary authority, necessarily exercised by orders, more or less general, is obvious. The general orders must be taken as subject to all reasonable conditions, and as only authorising what could be reasonably proper and according to the usages of the service. If the particular act departs from these conditions, then the Governor or military Commander can only be rendered liable by showing that he personally ordered or caused and procured the act (*Green* v. *Elgie*, 5 Q.B. 99; *Brown* v. *Chapman*, 6 Common Bench Reports). It is a general principle that no one is liable for the wrongful or illegal act of another, unless that other has acted under and in accordance with his general or special instructions; and in the case of general authority it must be shewn that the act was in performance

Besides the measures of repression peculiar to martial law, there may be a necessity for recourse to measures of precaution or prevention, as, for instance, arrests of suspicious persons, which may for various reasons not come under martial law, but may be justifiable at common law. As it would be idle to attempt the suppression of a rebellion without putting down its authors as well as its actors; and exciting and inflammatory publications may be main causes of a rebellion (*a*), it is manifest that the same necessity or

of it, and in accordance with its natural meaning and evident tendency. It is true that the authority may be implied from a subsequent sanction, or in the case of an arrest ordered by the secretary of a Governor in pursuance of his general object and obvious intention, and of which he, when he hears of it, does not disapprove (*Glyn* v. *Houstoun*, 2 Manning & Granger's Reps.), but that case comes fully within the principle already laid down; and as an authority to do an illegal act is not lightly to be implied, the mere knowledge of the act, and absence of express disapproval, if there were no previous authority within which it could possibly have come, will not be sufficient to involve a legal liability (*Wilson* v. *Tummon*, 6 Man. & Gr.). And therefore, if, as in the Jamaica case, the Governor merely declared martial law, and gave general directions to the military Commanders to capture or cut off the rebels, and to deal with severe cases, and not to inflict corporal punishment frequently (*vide ante* p. 213), he could not be held morally or legally responsible for acts, if any, done in excess of those general directions. And so, if the Commander issued general instructions that all ringleaders or rebels found in arms were to be executed, though this might fairly be deemed to include all found to have been in arms, as well as those actually taken in arms, it could not be deemed to sanction executions of men without evidence of actual or active participation in the rebellion. Nor could either the Governor or Commander be blamed for not preventing acts which they had virtually prohibited, and of which they were not cognizant.

(*a*) Thus the Governor of Jamaica, shortly after the expiration of martial law, wrote to the Secretary of State: "I have the honour to report that during the progress of the rebellion it became evident that several persons of better position and education had been engaged in misleading the negro population by inflammatory speeches or writings, and that these evil influences had a large share in causing the immediate outbreak in St. Thomas-in-the-East, as well as in leading to the brutal massacre of particular individuals who had been pointed out by name as the parties by whom the wrongs and oppression were in a great measure wrought, there could be no shadow of a doubt." He then went on to state, that chief amongst the parties concerned in this attempt to stimulate the negroes to

the same honest belief in it, which may lead the Governor of a colony, in cases in which such publications can be connected with the rebellion, to subject persons thus implicated in it, to trial by court-martial, may also lead him to apprehend others for such publications, who, in the absence of such evidence, it may be necessary to detain for trial by the ordinary tribunals, and it is conceived that such detention may be legal and justifiable at common law.

In such cases, whether the act of the Governor were

rebellion were Gordon, a person who had been convicted and executed by court-martial, and also two other persons, A. and B., the latter editor of a paper. These persons also had been arrested, and were intended to be tried by court-martial, but the military Commanders considered that as the alleged seditious publications were prior to the rebellion, and there was no evidence of any overt act to connect them with the rebellion or the actors in it, as there was in the case of Gordon, they were not properly triable by court-martial; a view in which the Governor had acquiesced (*vide ante*, p. 192). He then went on : "A. and B. were also taken, but were not tried by court-martial, the evidence available not being considered sufficient. It was thought better, therefore, to detain them in custody, and institute civil proceedings against them when martial law should be terminated. This course the Attorney-General has been instructed to take. There are several other prisoners of less position and note, but whose sedition and inflammatory teachings have had a most mischievous effect amongst the negroes, who were also captured during martial law, and are still detained in custody to be dealt with by the Attorney-General. I enclose an extract from a letter from A. to B., in which he states that he was writing editorial articles in his newspaper 'to shield you from the charge of anarchy and tumult that in a short time must follow these powerful demonstrations.' It is evident, from this letter, that both A. and B. were fully aware of the effect which the 'strong demonstrations' they were making would have on the negro mind, and that they wilfully and designedly pursued them to the issue they expected, 'anarchy and tumult,' whilst A. avows that he was engaged, as editor of a paper, in writing leading articles to screen B. and others from the charge of having led to the disorders which it was expected would take place." As to these persons, the Governor, shortly before the expiration of martial law, wrote to the military Commander to desire that they be kept in custody until the Government was in a position to deal with their cases, although martial law might have expired (*Parl. Pap.*, Part 1, 190). It is conceived that at common law this course would be perfectly legal and justifiable, upon principles already fully explained and authorities already cited (*vide ante*). No lawyer can doubt that the above would be

before or after the period of actual rebellion (*a*), or whether after the expiration of martial law or out of the district to which it applied, the validity or legality of his act, or rather his legal liability, for it would depend upon the common law, which, as already shown, independently of martial law and bills of indemnity, allows the largest possible immunity for acts reasonably necessary for the prevention of rebellion, although it does not until a state of war, resulting from actual rebellion, has been lawfully declared, allow of a resort to the means and measures of law, that is to say, martial law. Assuming any such acts of a Governor under such circumstances not to be legal or allowable, or entitled to legal immunity at common law, then it would be necessary to fall back on a bill of indemnity, which in such case

reasonable evidence on which to detain persons in custody during a period of great public danger, to abide their trial when order should be restored.

(*a*) As already shown, the operation of martial law, supposing it lawfully declared, commences, not from the declaration of it, but from the rebellion, which justifies it, for the declaration only declares an existing state of things (*vide ante*, p. 216). But then it requires an actual rebellion, and operates only from the time of such rebellion, and for so long as it is lawfully declared, the latter point, necessarily, not so determinate as the former, but at some point of time it ends, and either before its beginning, or after its end, or out of the district, the legal liability of the Governor for acts he deems necessary for the public safety rests on common law, or the ordinary law of the colony, whichever it may be (*vide ante*), which is certain to allow, at least, as much power to the Governor as the common law allows, and that allows, it is conceived, of all measures of precaution or prevention which may honestly and reasonably be deemed necessary in a state of public emergency resulting in rebellion, although, not without martial law, measures of summary punishment are by force of arms. The arrest of persons whose publication or acts appear likely to cause a rebellion may, it must be obvious, be a very reasonable measure of precaution or prevention, and their detention for trial after the expiration of martial law upon reasonable grounds, must equally be legally justifiable, according to authorities already alluded to. At all events, any step in an act of this sort is precisely the sort of thing intended to be covered by an act of indemnity, the scope of which, as already observed, is but casual, trivial, or incidental illegality, not wholesale and wilful violence to life or limb. Mere confinement for a few weeks, in a season of public peril, of persons considered guilty of seditious publications, is, it is manifest, a comparatively trivial matter, assuming it to have been a reasonable measure of

is certain to be passed, and as to which, it is to be observed, that though, under the Colonial Governors Acts, criminal proceedings, and at common law civil proceedings, may be taken in this country for acts committed abroad, and assumed to be criminal, or not to be legally justifiable, that is only a matter of practice or procedure affecting the place of trial, and not in the least affecting the legal liability, which remains as before, governed by the lex loci, the law of the colony, and, therefore, if by reason of a bill of indemnity proceedings could not be taken there, so neither could they be taken here.

For it is a fundamental principle of our law, that the legality of an act, or the validity of any legal immunity, or the operation of any matter of legal discharge (*a*), depends

precaution, and must be plainly within the scope of a bill of indemnity. And for reasons perfectly clear upon legal principle, a bill of indemnity in the colony would have an equal operation in this country.

(*a*) No principle is better established than this, that the lex loci governs the liability, the lex fori the law of procedure. Thus, the plaintiff cannot recover upon a written contract made in Jamaica which, by the laws of that country, was void for want of a stamp (*Alves* v. *Hodgson*, 7 Term Reports, 241); although, otherwise, if a mere stamp duty, our courts not taking cognizance of mere revenue law of a foreign country (*James* v. *Catherwood*, 3 D. & R. 160; *Pellecat* v. *Angel*, 2 C. M. & R. 311). The law of the country where the matter arose governs the legality of it, unless that law is contrary to natural justice or the usages of nations (*Wolfe* v. *Oxholme*, 6 Maule & Selwyn's Rep. 92). Generally, the lex loci governs the contract (*Power* v. *Whitmore*, 4 M. & S. 141), unless the law of the foreign country or colony is contrary to some law of this country, as the law of marriage, which, by its nature, pursues a British subject, and the matter arose between British subjects; and thus, a marriage abroad contrary to our law, as to British subjects, might not be valid, because British subjects, resident in a British settlement abroad, are governed by the laws of this country, and consequently, with respect to marriage, by the law which existed here before the Marriage Act, viz., the Canon Law (*Lautour* v. *Teesdale*, 2 Marsh. 243). But, on the other hand, on a plea of coverture, where the parties, British subjects, were married in France:—Held, that if the marriage would not be valid in that country, it would not be so in this (Lord Tenterden, *Lacon* v. *Higgins*, D. & R. N. P. C. 38; 38 Stark. 178). It is the general principle that a matter of discharge must be valid by the law of the country where the matter arose, and that if so valid, it will prevail everywhere, the only exceptions being those just pointed out; and

upon the law of the country where the act was committed, or where the legal liability, if any, or the legal immunity, if any, or the matter of discharge, if any, arose, *i. e.*, upon the lex loci; although the law of procedure which is applied, is the law of the country where the civil or criminal suit is brought, *i. e.*, the lex loci. This is one of those principles which are fundamental, because founded on natural justice and good sense. For otherwise it is obvious that, on the one hand, a man might act under one law and be tried by another; and, on the other hand, a plaintiff or prosecutor might, by merely altering the place of trial, alter the whole law applicable, which would often operate the grossest in-

thus, for instance, in the case of marriage, no sentence of divorce of any foreign country or state can dissolve an English marriage à vinculo, for grounds on which it was not liable to be dissolved à vinculo in England (*Rex* v. *Lolley*, 1 Russ. C. & M. 190; R. & R. C. C. 237). But the general principle, for civil and criminal cases, is that the law of the country where the matter arose governs its legality, and governs also the validity of any matter of discharge. Thus, for example, where a husband and wife carried on trade as partners in Spain, they cannot sue such as in our courts, nor maintain a joint action against persons resident in this country, to recover the amount of a balance due to the partnership account, without proof being given that by the law of Spain a feme covert is permitted to trade; and it is doubtful whether an action could be maintained by both even on such proof being given (Lord Tenterden, C. J., *Cosio* d. *Pinçyro* v. *De Bernales*, 1 C. & P. 266; R. & M. 102). And so, again, where the cause of action accrued in Scotland, and infancy is pleaded, the defendant must show that infancy is a legal defence to the demands by the law of the country (Lord Eldon, C. J., *Male* v. *Roberts*, 3 Esp. 163). It is true that it has been held that acts of attainder and confiscation being passed by sovereign independent states, do not disable A. from suing, nor exempt B. from being sued in England (*Ogden* v. *Tollett*, in error, 4 Brown's Parl. Cases, 111); and that penal laws of another country do not import a personal disability to sue in this country, civilly or criminally, because the penal laws of foreign countries are strictly local, and affect nothing more than they can reach; and it is to be observed that the judgment in that case was affirmed on a different ground, viz., that the acts of confiscation (by American States against loyal British subjects) were to be deemed void in the courts of this country, a ground coming within the exceptional principles already laid down. But the general principle is, that in a suit between parties resident in England, on a contract made between them in a foreign country, the contract is to be interpreted according to the foreign law, but the remedy must be taken according to the law here (*De la Vega*

justice, and, moreover, a contrary doctrine would often virtually violate the comity of nations in the case of independent states, or the legislative rights of free communities in the case of our own colonies. Upon the same general principles of natural justice, practical convenience, and comity of nations, on which the law of the foreign country or colony is recognized and applied to the cause of action, the judgment of a court of justice there upon the same subject-matter, and between the same parties, is equally recognized as a legal discharge, *i. e.*, as a judicial discharge, in the courts of this country; and upon the same principle, an act of indemnity passed in that country or colony, which is

v. *Vianna*, 1 B. & Adol. 284). Thus it is that one foreigner may arrest another in England for a debt which accrued in Portugal, while both resided there, though the Portuguese law does not allow of arrest for debt (*ibid*). The rule applicable to contracts made in one country, and put in suit in the courts of law of another, is this: the interpretation of the contract must be governed by the law of the country where the contract was made, and the mode of suing, and the time within which the action must be brought, by the law of the country in which it is sought to be enforced (*Trimby* v. *Vignier*, 4 M. & Scott, 695; 1 Bing. N. R. 151). Thus, where a contract is made between persons domiciled in a foreign country, and in a form known to the law of that country, the court, in administering the rights of parties under it, will give it the same construction and effect as the foreign law would have given to it (*Anstruther* v. *Adair*, 2 Mylne & K. 513). Where a personal contract made in a foreign country is sought to be enforced, so much of the law as affects the rights and merits of the contract is adopted from the foreign country, and all which affects the remedy is taken from the lex fori of the country where the action is brought. The distinction between that part of the law of the foreign country where a personal contract is made which is adopted, and that which is not adopted by our courts, is, that so much of the law as affects the rights and merits of the contract, all that relates ad decisionem litis, is adopted from the foreign country, so much of the law as affects the remedy only, all that relates ad litis ordinationem, is taken from the lex fori of that country where the action is brought. In the interpretation of this rule, the time of limitation of the action is governed by the law of the country where the action is brought, and not by the lex loci contractus. Thus, as by the French law of prescription relating to bills of exchange, the debt is not extinguished, but the remedy only is taken away (*Huber* v. *Steiner*, 2 Scott, 304; 2 Bing. N. R. 202). An action lies in this country though barred in France (*ibid*); and, on the other hand, an action on a Scotch contract may be barred here,

another species of legal discharge, *i. e.*, a legislative discharge, would be equally recognized in the courts of this country in any court or criminal proceedings. If it were not so, a legislative discharge would not have the same effect as a judicial discharge, and the power of legislation in the colony, over matters within its jurisdiction, would virtually be set aside or neutralized by the courts of this country.

It will have been manifest that the most important and difficult question likely to arise is as to the continuance of martial law, or rather the continuance of its execution. The considerations which would influence a Governor,

although not barred in Scotland (*British Linen Company* v. *Drummond*, 10 B. & C. 903). And so as to causes of action arising in India or any colony (*Williams* v. *Jones*, 13 East's Reports, 439). But the reason is, that Statutes of Limitation bar the remedy and not the right (*Higgins* v. *Scott*, 2 B. & Adolphus, 913). So strong is the principle that the lex loci governs the cause of actions, that as regards our colonies, though our courts would not recognize the state of slavery, so as to give effect to it, they would recognize the law as to slavery existing in some of those colonies, with respect to its bearing on the cause of action (*Keane* v. *Boycott*, 2 Henry Blackstone, 511; *Madrazo* v. *Willes*, 3 Barn. & Alderson's Reports). It has, indeed, been held by the House of Lords, that the law of a country where the contract is to be (*i. e.*, by the contract), performed and enforced, must govern the construction of the contract, but that is by virtue of the contract itself (*Don* v. *Leppman*, 5 Clark & Finelly's Rep. 1). A similar principle obviously applies to all acts or causes of action arising abroad; and on the same principle, and also according to the "comity of nations," a principle applied by analogy to the courts of our own colonies, the judgment of a foreign court on the subject-matter is recognised as conclusive in the courts of this country, unless the proceedings are shown to have been clearly contrary to natural justice (*Phillips* v. *Allen*, 8 B. & C. 477; *Martin* v. *Mcolls*, 3 Simon's Rep. 485; *Douglas* v. *Forest*, 4 Bingham's Rep.). To render a foreign judgment void on the ground that it is contrary to the law of the country where it was given, it must be shown clearly and unequivocally to be so (*Beckett* v. *McCarthy*, 2 B. & Adol. 951). The sentence of a foreign court of competent jurisdiction, condemning a neutral vessel taken in war as a prize, is good against the world (*Dolrie* v. *Napier*, 2 Bingham's N. C. 781). And although, on the other hand, an action may be maintained here for tortious acts done abroad, as in a colony, it is subject to the law of the foreign country or colony; and also if judgment has been given by a court there on the same matter, it is final (*Smith* v.

rightly or wrongly, in sanctioning the measures of severity or repression, which appeared to be required for the suppression of rebellion, whether or not under martial law, would be the same as those which would influence him in determining the continuance of the execution of martial law, *i. e.*, considerations of danger (*a*). The evidence of such danger would probably be considered to be afforded by information from the local authorities as to facts showing the continuance of the spirit of rebellion, especially if indicated by acts of outrage, or threats of outrage, or acts of preparation for outbreak, among a numerous class of the population, and the continuance of that disproportion

Nicholls, 5 Bingham, N. C. 208). A judgment, whether for one party or the other, is, it is obvious, a species of legal discharge, *i. e.*, a judicial discharge; and the same principle of law applies in either case. To any suit here, on a foreign contract, it is a good bar that it was illegal by the law of that country (*Heriz* v. *De Casa*, 11 Simon's Rep. 318); and the same principle would apply as to legality (it not being contrary to any law of this country applying to the parties), and would equally apply to any other acts, and to torts as well as contracts. Thus, the courts of this country, in dealing with real property in Jamaica, will follow the law of Jamaica, even as to evidence (*Tullock* v. *Hartley*, 1 Young & Collyer, 114); and although they will apply general principles common to all countries, this is only provided the law of the colony or foreign country is not different (*Bentinck* v. *Welbeck*, 2 Hare's Rep. 1). It is only when the English law has been applied in the colony that it governs the contract or cause of action (*McKay* v. *Rutherford*, 6 Moore's Privy Council Cases, 413; *Logan* v. *Mesurier*, *ibid*). These principles were recognised in a recent case, where a party sued here for an assault in Naples, and the defendant set up mere matter of procedure by Neapolitan law, which, of course, would not avail; but it was not disputed that if there had been a legal justification or discharge by Neapolitan law, it would have been valid here (*Scott* v. *Lord Seymour*, 6 H. & N.).

(*a*) As the Author observed, in his former work, the propriety of relaxing or terminating martial law would depend upon the advices received by the Governor. In this case, at the end of ten days from the outbreak of the rebellion, and nearly that time from the declaration of martial law, advices were received by the Governor of outrages threatened or committed, of inefficiency of civil and military force to prevent their perpetration, and of general alarm and apprehension, showing a sense of danger still impending (*Treatise on Martial Law*, 207). To this he added, that as the object of the Government is that confidence which can only result from the sense of security, if, in point of fact, there was widespread alarm and ap-

between that class and the loyal portion of the community, and that deficiency of military force for their protection, which would probably render a rebellion successful, if in such a state of things it were once allowed again to break out and to spread, and would expose the loyal to certain destruction.

It is obvious that at the time of the suppression of an

prehension, whether well or ill-grounded, that itself was a fact, which could not be an important element in his judgment. In the Parliamentary Papers, Part I., and in the evidence of Mr. Eyre, are given a vast number of communications received by the Governor at the time of the trial of Gordon (21 Oct.), and thence until and up to, and even after the cessation of martial law, showing, in every part of the island, the plainest proofs of a strong disposition to rebellion, and even acts of open outrage, or threats of outrage, arming, drilling, &c., in fact all the indications of an imminent danger of a renewal of actual rebellion. Thus, on the day of Gordon's trial, the leaders being still at large, the Custos of Clarendon wrote to the Col. Sec., October 21, 1865.—"I regret to say that an attempt to burn down the Court-house has been discovered. I have thought it right to put the volunteer force under arms, and they will be quartered at the Court-house. I beg to report that the police force are without ammunition." The Custos of Westmoreland wrote, a day or two afterwards, that he had held a magisterial investigation as to arming or drilling, and had issued a proclamation against it, and about the same time the rebels met the Queen's troops in the field in another district. On the 24th the Custos of Ann wrote, that from all he had learnt he believed that there would be a serious outbreak on the 2nd Nov. Men belonging to the rebel class were heard to say, that there would be more blood spilt; that they wished the rebel force would arrive here, as they were quite ready to join; that men had been using most seditious language, and that the magistrates had not apprehended them; that a man even declared that he had been at the seat of the rebellion, and that he would bring about the same state of things here, &c. So the Custos of Manchester (Oct. 28), received information that assemblies of persons were taking place, and they were fearful these gatherings might be evil. These are mere instances as illustrations. Such communications for were received daily from the time of the execution of the leaders up to the cessation of martial law. And after careful enquiry, the Royal Commissioners pronounced their deliberate opinion, that on these communications the Governor "would have done wrong if he had thrown away the advantage afforded by the terror which the name of martial law inspired," only they thought that after ten days the *execution* of martial law might have stopped. But they overlooked this, that as even the execution of martial law did not do more than just keep the rebellion down, the mere name would hardly have had that effect.

actual insurrection (*a*) in a particular district, there may be manifest proofs of the prevalence of a spirit of rebellion, and of actual preparations for insurrection in other districts, or even perhaps throughout the colony, which, coupled with the enormous preponderance of the disaffected portions of the population, and the deficiency of military force for the protection of the loyal and peaceable, may constitute a case of great and imminent danger of the renewal of actual rebellion in the same or other districts, and may imperatively require *either* the terror of martial law or the distribution

(*a*) This was the case in Jamaica, when rebellion had *broken out* in a particular district, and Mr. Eyre's statements that it had been subdued, *i.e.*, the actual insurrection in the particular district where it had broken out, were strangely misconstrued to mean that all danger was over, and that the *rebellion* was entirely at an end, because *actual* rebellion where it had first broken out was subdued. But the whole tenor of his despatches, down to and after the cessation of martial law, disclosed a very different meaning and a very different state of things. Thus the Governor wrote to the Commander-in-Chief of the colony: "We have abundant and undoubted proof that the same spirit of disaffection and disloyalty which led to the rebellion in St. Thomas-in-the-East exists to a considerable degree in every parish in the island; and in a county so extensive as Jamaica, and affording so few facilities for receiving early intelligence, or for making rapid movements by land, it is absolutely essential that for some time to come a considerable number of points should be occupied as military positions around the coast and island" (Mr. Eyre to Gen. O'Connor, Oct. 27). And afterwards, on the day before the expiration of martial law, when after a delay of ten days, caused by differences with the Commander-in-Chief as to the distribution of the troops, that distribution had just been completed, the Governor wrote to a military officer: "At the time that you arrived the insurrection in the eastern parishes was thoroughly got under, but from information reaching the Government from every direction it was evident that a seditious and disloyal spirit pervaded the entire island, and that in several localities the negroes were prepared to rise, and repeat the scenes which occurred in St. Thomas-in-the-East, if a fitting opportunity presented itself; there were also good grounds for supposing that a considerable amount of intercommunication had taken place between the disaffected of the different parishes, and that had the rising not been brought about somewhat prematurely at Morant Bay, it would at a later period of of the year have been more general and simultaneous. Under these circumstances the natural and, indeed, the necessary action of the Government was to station small parties of troops as rapidly as practicable at as great a

of military force for its suppression, and, therefore, may appear to require the continuance of martial law, until there has been such a distribution.

Such circumstances may be considered to raise a difficult question, which in the United Kingdom has been deemed under similar circumstances to require legislative solution, whether martial law may not be justified as a measure of prevention, even in other districts, where there has not as yet been any actual rebellion (*a*). And although a Colonial

number of distinct positions as possible; under the circumstances in which the colony is placed there is no help for it, and it is better that the troops should suffer in their military organization and discipline for a time, if thereby they can *prevent the outbreak of rebellion*, that by being concentrated and kept in good military order they should leave openings for the disaffection to gain ground and break into a rebellion, which once existing might require a much larger number of troops and a long period of time for its suppression. That the policy is a sound one is shown by the result at each station where difficulties were anticipated; the mere stationing of a small body of troops has allayed apprehension, and has so far had the effect of keeping the several districts quiet. It is, however, important to bear in mind that it does not follow because the districts are quiet, therefore the troops may be withdrawn; it is the presence of the troops that causes this quietude. The tendency to sedition and rebellion is still latent, and requires to be carefully watched and kept in check for some time to come." (Gov. Eyre to Col. Whitfield.)

(*a*) This state of things in Ireland has led the Imperial Legislature either to sanction the Government in declaring martial law, even although there had been no actual rebellion (a course always of doubtful legality), or to pass a measure allowing a partial or modified form of martial law in case of apprehended rebellion (*vide ante*, p. 133). In a colony where there is no such modified form of martial law provided, it is manifest that the position must be one of great difficulty, and that difficulty was one of the many which arose in Jamaica. Martial law had been strictly limited to the district covered by the actual rebellion, but there were such proofs of a disposition to rebellion all over the colony that the military Commander wrote to the Commander-in-Chief, that from what he had seen of parts of the island, and the great difficulty experienced in procuring means of transport, he was of opinion that the other parts should be immediately placed under martial law, or his presence here, with my present small force, will be of little service to the colony. To this the Commander-in-Chief added :— "I endorse the opinion, having been convinced from the first breaking out of the rebellion that the whole island ought to have been placed under martial law." Nevertheless, notwithstanding this strong opinion, the

Governor may be deemed to have acted wisely and judicially in resisting representation for an extension of martial law, under such circumstances, to districts in which there has not been any actual outbreak, he will probably be considered justified in maintaining it in the district in which there had been an actual rebellion.

The necessity for continuance, and even for the continued execution of martial law, might be shown by cases in which the infirmity of the means and measures of common law, for the repression of acts of preparation for rebellion, have been remarkably illustrated. Thus, as to secret arming or drilling, as there is nothing in such acts of themselves necessary illegal, and they could only be rendered punish-

Governor declined to take that course, and wrote: "My own views being strongly adverse to the establishment of martial law in parishes in which, although excitement exists and seditious language has been openly used, no actual outbreak or disturbance has occurred, I summoned my Executive Committee, and submitted to them the communication." And then he wrote as to the result: "We are of opinion that strong indications exist of a considerable amount of excitement and disaffection in most of the western parishes. At the same time other portions of the western parishes, though, as far as we are aware, free from any actual disturbance, are in a very unsettled state. In order to meet possible contingencies, and afford the largest amount of protection to the loyal and well-disposed inhabitants, we are of opinion that certain posts should at once be occupied by troops, as originally proposed, &c. With regard to the immediate proclamation of martial law in the other parishes as requested, I would remark that *as no actual outbreak exists in any of them*, I do not consider it will be politic or right to adopt the course suggested at present. Should any serious disturbance take place, I should be ready to recommend its adoption to a Council of War, which would have to be summoned to consider the question." This course was highly approved of by the Secretary of State, who, although he considered himself compelled to censure the course taken by the Governor in continuing the execution of martial law in the district where it had been proclaimed, couched his censure in the most considerate terms, and coupled it with an entire approval of the course taken in resisting the pressure put upon him to induce him to extend the area of martial law, and perhaps some may think that in pronouncing this censure sufficient weight was not given to those considerations which may have been drawn from the general condition of the colony, in regard to the continuance of the operation of martial law in the district where it existed, as a compensation for not extending it beyond that district.

able by strict proof of a treasonable intent, afforded through the doubtful and dilatory process of legal prosecution, it might practically be impossible to put a stop to such acts at common law, and yet it is manifest that to permit a disaffected class of the population, possessing an overwhelming preponderance in numbers, to arm themselves and organize themselves, and thus prepare for actual rebellion, would be simply to sacrifice the loyal portion of the community, or place them entirely at the mercy of the rebels; and, under such circumstances, it might be essential to continue martial law in force until an adequate military power was distributed throughout the country (*a*).

(*a*) Thus, at the time martial law had actually terminated in Jamaica, the Governor received from the Custos or Lord-Lieutenant of a district, far distant from the scene of actual insurrection, official communications from the local magistrates, enclosing reports of police inspectors as to discoveries of arms. Thus, there were found at one place upwards of a hundred pikes, or spikes made of hardened wood, evidently intended for offensive use, as they could not possibly be of any other use. The report of the Police Inspector, November 16 (two days after martial law was over), stated, "I received a despatch, stating a number of people in the district were armed with spikes. I went up during the night, accompanied by police, and searched the house, in which I found upwards of 100 spikes made of hard wood; they are about eight or nine feet long." He adds, that he has also sent down some from another district, also armed with spikes. He says he is told there is no Act to try the people by, and he has therefore written to ask how he is to act, and he says, "I believe all the Revivalists in this parish and Manchester are similarly armed. Mr. Lawrence wished me to apprehend them all in this parish. If I had done so, I would now have had in custody upwards of one hundred. I did not think it advisable, for if they were apprehended, and then discharged, it would do more harm than good." He added, "as the soldiers are now here, I believe that they are needlessly alarmed." So it was plain that it was only the presence of the *military* which afforded any adequate protection. Yet, when the magistrates desired to know what could be done, the Custos, or Lord-Lieutenant, wrote to them in these terms:—"It is no offence to be in possession of any number of sharpened hard wood stakes, but it may well be coupled with the surrounding circumstances, an index of an intent to rebel, or commit some offence, or one of the offences as are specified in the Island Act, 4th Geo. IV., c. 13, s. 1. If, upon examination of the prisoners, corroborative, circumstantial, or other evidence be obtained, showing a reasonable suspicion of a plot for any such purpose, they should

It is manifest that, as the only necessity for martial law arises from the absence or deficiency of military force, the mere presence of which of itself exercises a deterrent influence sufficient to give peace and confidence (*a*), that necessity may exist so long as that deficiency exists, but must terminate as soon as that deficiency is at an end; and that,

be held to bail to answer for conspiring to, &c., &c.; if not, they should be dismissed with a judicious caution, but without any threat of the possibility of their bringing the infliction of martial law on themselves by the manifestation of a disloyal spirit, and should be informed that the Governor can declare it much more promptly now than heretofore." And he added, "It is not desirable to apprehend any subject on a charge which, if proved, *the law does not deem a punishable crime*" (Parl. Pap., part 1). The Attorney-General of the Island appears to have sanctioned the same view (Parl. Pap.), which is supported by the fact that special statutes were deemed necessary in this country and in Ireland to prevent arming and drilling. And such a statute was afterwards passed in the colony alluded to. But in the absence of any such statutable provision, it is manifest, that in such a state of things protection could only be afforded in one of two ways, either by the terror of martial law, or by the presence of an adequate military force. Accordingly, under such circumstances in Jamaica, martial law was continued until a military force was distributed through the disturbed districts. These matters, of course, would weigh strongly with the Governor, and shortly afterwards he wrote to the Secretary of State:—"There can be no question but that the island is still in a very precarious position, and that we are only enabled to keep down a further rising of the negro population by the most watchful vigilance and by the constant presence of troops and men of-war. The pikes described in the letters to Mr. Salmon are similar to what the people in Hayti use as weapons" (Mr. Eyre to Mr. Cardwell, 20th Nov.).

(*a*) Thus, in the Jamaica case, the Governor, so soon as the military reinforcements arrived, desired to take steps for their distribution through the island, in order to remove the danger and restore peace and confidence, which would have enabled him to dispense with martial law; and he wrote thus to the Commander-in-Chief:—"In the existing state of matters in Jamaica, with seditious language, expressions of sympathy with the rebels of the eastern districts, or positive threats openly and publicly made use of in many places, it is essential that such arrangements should be made, by obtaining the support of small bodies of military, as would enable the Government to capture and punish the offenders without incurring the risk of allowing an actual rising of the negro population to take place, and gain head. What is now required in the western provinces is, not to undertake military operations where no actual rebellion exists, but to make such a disposition of the forces available for service in the colony as will

therefore, martial law ought to be suspended as soon as a sufficient military force is obtained to distribute through the disturbed district, in such a way as to restore peace and remove danger, or, at all events, so soon as that distribution has taken place.

prevent rebellion breaking out, will, as far as such can be provided for, render life and property safe, and will give a feeling of confidence to the settlers. Neither war nor actual rebellion exist at present in the western districts: there are no parties in arms against us, nor is there any organised body of negroes, so far as I am aware; consequently there is at present no requirement for a large force in any one position, and no likelihood of any serious opposition being made to a trained military body of even fifty men only, aided, moreover, as they would be by volunteers, police, or the resident settlers, in the case of any disturbance. The principal positions at which military support is considered to be required for a time are comparatively isolated from each other, with no very rapid or constant intercommunication, and that an outbreak might occur at any one of them, and the white population be massacred, and property destroyed, as at Morant Bay, before aid could be rendered from a position only a few hours off in point of time. It is better to locate troops in spots where, from the character of the population or local circumstances, we had reason to fear might become the theatre of outrage. I believe that if this policy is continued for some little time, the country will settle down into its usual quietude" (Governor Eyre to General O'Connor, 29th October. Parl. Pap. Part 1, p. 70). The Commander-in-Chief, however, differed with the Governor, and desired to keep the troops chiefly in one position, and to declare martial law over the whole island or over great portions of it, which the Governor refused to do. Hence from the 30th October to the 10th February, the distribution of the troops was delayed, and only three days afterwards martial law was put an end to. Throughout, the main danger was the spread of the insurrection, and when it was subdued in one district, lest it should break out in another. Thus, the Governor writing for more troops, said: "General apprehension and alarm exists lest the movement extend to the entire island, and the insurrection become a general one. In this emergency, a large portion of the troops stationed in this colony have been rapidly withdrawn from the head-quarters, and distributed at various points in the disturbed districts. The whole of the troops in this colony do not exceed above 1,000 (exclusive of those at Honduras and Bahamas), and I cannot conceal from myself, that such a number is utterly inadequate to suppress the insurrection in the districts where it now exists, and would not supply any troops whatever for the assistance or defence of other portions of the colony, should the outbreak, as is feared may be the case, unhappily extend to them. It may be as well to bring to your Excellency's notice, as an additional reason for this urgency, the immense area of

Under such circumstances (*a*), in presence of an imminent peril of renewal of the rebellion, a Governor will be deemed justified in maintaining martial law, in order to have the advantage of the terror which its name inspires, although the period or the degree to which its execution shall be continued is a matter upon which he must exercise his judgment, under his responsibility to the Crown. And, at all events, so long as a real danger exists, or can reasonably be deemed to exist, the Governor of a colony need not fear

Jamaica, extending about 150 miles in length, and from 50 to 60 in breadth, and the physical features of which are of such a nature as at once to prevent a rapid inter-communication with distant points, and render exceedingly difficult all inland movement of troops, whilst they afford both shelter and supplies of food to the insurgents in fastnesses of the mountains, where a large portion of the peasantry reside" (Desp. of Mr. Eyre to Governor of Nassau).

(*a*) Thus, with respect to the primary question as to the proclamation of martial law, the Commissioners said that the Council of War had good reason for the advice which they gave, and that the Governor was well justified in acting upon that advice, though they disapproved of the continuance of martial law in its full force to the extreme limit of its statutory operation, and to the excessive nature of the punishment inflicted: "In reviewing this painful portion of the case, the greatest consideration is due to a Governor placed in the circumstances in which Governor Eyre was placed. The suddenness of the insurrection; the uncertainty of its possible extent; its avowed character as a contest of colour; the atrocities committed at its first outbreak; the great disparity in numbers between the white and black populations; the real dangers and the vague alarms by which he was on every side surrounded; the inadequacy of the force at his command to secure superiority in every district; the exaggerated statements which reached him continually from different parts of the island; the vicinity of Hayti, and the fact that a civil war was at the time going on in that country—all these circumstances tended to impress his mind with a conviction that the worst consequences were to be apprehended from the slight appearance of indecision." The Governor gave these reasons for continuing martial law:—"1st. In order to deal summarily with the cases excepted from the operation of the amnesty, many of the parties being as guilty as those tried by courts-martial previous to the amnesty. 2ndly. To preserve peace and good order in the districts where the rebellion had existed, and to afford time to reorganise the civil institutions. The magistrates, the clergy, and other principal inhabitants had been killed, wounded, or driven away. The inspector of police had been killed, and the force became disorganised and demoralised

that he will be considered to have acted rightly in maintaining martial law, provided its execution be kept as far as possible under due control. And it is manifest that its control must be based upon the same principles, and those considerations of necessity for the public safety, which alone justify its declaration.

The true principles of martial law (*a*) have, indeed, been admirably explained and expounded by the ministers of the Crown, in their comments upon the events of a recent unhappy rebellion (*a*); and although it has been acknow-

3rdly. It was important that for some time longer at least the Government should continue martial law, to operate as an example and a warning in terrorem over the disaffected of other districts, without the necessity of imposing it in those districts. 4thly. The indication which the continuance of martial law in the county of Surry for some days after the amnesty gave of the determination of the Government to deal promptly and decisively with persons guilty of rebellion, or the concomitant crimes of murder and arson, was the most efficacious step it could take to overawe the evil-disposed in other parts of the colony, and thereby prevent any rising amongst the negro population of the districts where disaffection and seditious tendencies were known to exist. Those were the four principal reasons which operated with the Government at the time." The Commissioners reported that the Governor would have been to blame if he had thrown away the advantage given by the terror which the name of martial law inspired, and the Secretary of State concurred in the view (*vide ante*, p. 202), although he thought that the execution of martial law ought to have been suspended so soon as the reinforcements arrived.

(*a*) Thus Mr. Cardwell, in his final despatch upon the subject, lays down in clear terms the governing principle. Future good government is not the object of martial law. Example and punishment are not its objects; its severities can only be justified when, and so far as, they are absolutely necessary for the immediate re establishment of the public safety. Next, in accordance with the Report of the Royal Commissioners, he laid down the great rule that "measures of severity, when dictated by necessity and justice, are in reality measures of mercy," for then the course of punishment was arrested as soon as you were able to do so, and you have exerted yourself to confine it, meanwhile, to ascertained offenders, and to cases of aggravated guilt. And that no time should be lost in checking, at the earliest possible moment, those measures of instant severity which only an *overwhelming* sense of public danger justifies, and returning to the ordinary course of legal inquiry, and of the judicial trial and punishment of offenders. The Secretary of State admitted (*vide ante*), that the matter was one of difficult and delicate judgment, and one on which the

ledged that any error of judgment which may have arisen on that occasion may be in a great degree accounted if not atoned for by the suddenness of the emergency and the absence of instructions, those despatches have gone far to dispend with the need for such instructions, and afford ample materials for future guidance, should the occasion ever again unhappily arise in any British colony.

Under the conditions, and within the limitations thus laid down, and subject to such restraints and regulations as have thus been suggested as arising naturally and necessarily out of the principles upon which, and upon which alone martial law, or the means and measures of war, can be justifiable, such measures are not only undoubtedly lawful and allowable (*a*), but it is the bounden duty of the Governor of a

conduct of the Governor was entitled to every consideration. Mr. Cardwell indeed added with characteristic candour, that there were no instructions on the subject, and that it might be matter for consideration whether any could be issued; but his successor, Lord Carnarvon, has intimated very truly, that no instructions can relieve a Governor from the necessity of acting on his own responsibility, and the admirable despatches which the Jamaica case has elicited, and the substance of which has been carefully embodied in these pages, must go far to dispense with the necessity for any further instructions, and to afford ample guidance for the future, should any occasion for it unhappily arise. And this reflection may mitigate the regret that otherwise might be felt at much that has occurred.

(*a*) Thus, in the course of a recent debate on the subject, the eminent person, Mr. Headlam, whose official opinion as Judge Advocate-General has already been alluded to, said: "He thought that the law of this country was not only amply sufficient to justify the Crown in taking sufficient measures for the defence of the realm, but that the minister of Crown would be liable to the gravest censure—would be liable almost to impeachment—if he neglected to take sufficient precautions for the defence of the country. He was, further, of the same opinion in the present case also; that it was not desirable to alter the existing law, and that it was better to leave it in the same state in which it had always been, the duty of the Governor being to take care, in the words of the old Latin maxim, ne quid detrimenti respublica capiat. Whether they called it martial law, or the law of necessity, it was precisely the same thing. If the executive authority superseded the ordinary law of the country when a sufficient case of necessity arose, they were all agreed that it should be supported in that, and also that it should be covered by an act of indemnity afterwards. At the same time he was not prepared to say that they ought to fetter and

colony, in case of rebellion, to declare martial law, and he will be held seriously responsible if he does not; and if in consequence of such neglect a rebellion gains ground which otherwise might be suppressed. And the declaration of martial law, when thus lawfully declared, will be deemed to justify all such measures as are honestly deemed necessary by the military authority to meet the emergencies, martial law being in effect the law of war, justified by necessity, and administered by military authority.

control any such authority by declarations of that description. There were two distinct dangers before them. If they made precise declarations of that description they might fetter and control public men, and render them so timid in case of emergency that they would fail in their duty. On the other hand, they might pass enactments which would tempt weak men to exercise powers which ought not to be exercised unless absolutely necessary. It was, perhaps, too much to expect men to act with perfect wisdom in every case, but if they acted in strict good faith, and for the best, they could not be fairly refused an indemnity afterwards. Whether such proceedings were justified by martial law, or upon the plea of necessity, appeared to him a matter more of words than of substance." The Secretary of State for the Home Department, Mr. Gathorne Hardy, while deploring the fact that necessity sometimes compelled the proclamation of martial law, noticed "that honourable members had admitted the occasional occurrence of such a necessity, nor did the Lord Chief Justice ignore the necessity which might arise of setting aside the law of the land and securing with great vigour the military law such as is enforced by a General in an enemy's country. The Lord Chief Justice, indeed, admitted that though an insurrection were suppressed, it might be necessary to continue the enforcement of martial law, in order to strike terror into the minds of the people for their better order in future. Everyone was agreed that in cases of insurrection and danger to the lives of peaceful citizens it was the duty of those exercising the supreme power to put aside the ordinary laws, and to proclaim martial law until the insurrection was suppressed; and it did not need the existence of armed resistance to constitute insurrection. He knew of none who said that the Jamaica authorities who had been referred to were wrong in using, in the first instance, the most forcible means to put down the rising. He thought, that if an executive were to act by military power, it would proceed in accordance with the ordinary law of the case, and military force would involve military law. If military force were adopted, it was surely fairer to announce to those against whom it was proposed to act that the ordinary course of law be superseded? He trusted that neither in Ireland nor in the United Kingdom, nor in any of the colonies, would the occasion ever

Thus, those general views of the law upon the subject which had been put forth by the Author in his former work, and are maintained in the present, have been, after prolonged discussion, substantially upheld by Parliament; and with the full assent and sanction of Parliament it has been stated that the Crown has issued general instructions to the Governors of colonies, for the commanders of naval or military forces, in which those views (*a*) are embodied. That

again occur for the employment of those powers which were necessary to the executive in times of great emergency. At the same time he implored the House of Commons not to place an impediment in the way of those who were acting in distant spheres, and to whom, with great responsibilities, was committed the duty of upholding the authority of the crown and the rights of this country." The right honourable gentleman, Mr. Cardwell, who had been Secretary of State for the Colonies during the period when the Jamaica case occurred, and whose considerate despatches have afforded such valuable guidance, substantially concurred in this view, and truly observed, "that the chief and most fertile source of abuse, when the deplorable emergencies to which the motion pointed to occurred, was the fact that usually the inferior agents over whom the higher authorities were called upon in circumstances of extreme difficulty to exercise control, were guilty of excesses which their superiors would, if they could, have been glad to restrain. The adoption of a vague abstract resolution like the present one, however, instead of strengthening the bonds of discipline, and increasing the control of the superior authority over its subordinates, might have rather a contrary effect."

(*a*) The Admiralty issued, under the advice of their able counsel, the following instructions, in which the distinction between the actions of the military in aid of the civil power, and the functions of the military power under martial law, was well drawn: "Instructions for the guidance of officers and party when the ordinary law prevails. 7. If called upon to act for the suppression of riots and other disturbances when the ordinary law prevails, the following precautions are to be strictly observed:—The party is to be employed only on the requisition of the civil authority. The party is not to act without the presence of the civil authority, except for the purpose of self-defence, or the prevention of actual violence to the persons or property of Her Majesty's subjects. The party is to fire only by order of the officer in command. Notice is invariably to be given that the fire will be effectual, &c., &c. Instructions to the commanding officer of a party landed when martial law has been proclaimed. 9. If martial law should be proclaimed in any district, you are then to follow the directions of the officer appointed to the military command of the district. 10. The arbitrary will of such officer in such case supersedes the ordinary law for

is to say, that there is an essential distinction between the function of the military forces when called out merely in aid of the civil power, and when acting under martial law; that, in the former case, they are under the civil power, and in the latter case they are not; that, in short, martial law is military rule, and supersedes or suspends the ordinary law, and establishes for the occasion absolute military power. It follows that from the very nature of martial law, as it is absolute and discretionary military authority, it is hardly

the time being, in the same manner and degree as it would if the district placed under martial law were an enemy's country. 11. You are to require directions in writing from the officer in military command of the district under martial law as to your conduct in all matters of importance, especially in regard to the treatment of prisoners taken by you, whether they be taken in the actual commission of violence against the persons or property of Her Majesty's subjects, or under other circumstances. 12. It is competent for the officer in military command of the district under martial law to order prisoners to be brought to trial in a summary manner before a council, to be named as he may direct. 13. If you are to preside over any such council, usually termed a court-martial, although not necessarily constituted under the provisions of the Mutiny Act, you are to request instructions in writing from the officer in military command of the district, and you are not to carry into execution any sentence of such council, whether of death or otherwise, without being empowered so to do in writing by such officer. 14. You will take minutes in writing, if employed on any such council, and you will require such of your officers as may be so employed to take minutes in writing of all the proceedings and evidence, to be communicated to your Commander-in-Chief for his information. 15. You will take care, if so employed, and you will direct your officers, when so employed, and apply for the assistance, if possible, of a legal adviser. 16. In case it shall not be practicable to obtain directions in writing from the officer in military command of the district, you will endeavour to obtain directions in such mode as will admit of no subsequent doubt as to their tenor, and shall commit them as soon as possible, if practicable, to writing. 17. Under no circumstances are houses or property to be destroyed, except under the exigencies of military operations or of self-defence, or under an order from the officer in military command of the district under martial law. 18. The officer in command of a party is to keep a journal detailing all his proceedings, a copy of which is to be forwarded for the information of the Commander-in-Chief. 19. In conclusion, you will observe that these instructions are framed for your guidance, in the absence of specific directions from the officer in the military command of the district, and you are in all matters relating to operations on shore to follow his directions. 20. If

possible to issue before hand specific instructions, and such as have been issued to the Governors of colonies or Commanders of forces are only designed to aid them in the exercise of their judgment and discretion, by the suggestion of considerations which should guide them, or regulations

any directions given by the said military officer should conflict with any of these instructions, you are nevertheless to act in accordance with his directions, first bringing to his notice, if possible, these instructions. You are carefully to weigh the comparative importance of any conflicting instructions you may receive, remembering that you will still be responsible to your naval superior for the execution of any orders you may receive from him. So the late Under-Secretary of State, Mr. W. E. Foster, last session asked the Under-Secretary of State for the Colonies when he would lay upon the table of the House the instructions which he had informed the House would be sent to the Colonial Governors for their guidance in case of insurrection; and, if not able to do so at once, whether he would object to state the purport of such instructions? And Mr. Adderley in answer said, the instructions to which the question referred were not complete. They were sent out in confidential draught for the consideration of the Governors of all colonies, and it was thought in the office that some modification would be necessary in their phraseology. In fact, the instructions were not meant to be imperative recommendations, but were intended in the way of advice and caution to Governors in the case of insurrection. As to the general purport of them, it was to this effect:—That no place should be proclaimed as in a state of insurrection unless there be armed resistance to law beyond the ordinary powers of suppression. Then such proclaimed district should not extend further than was necessary for public safety. Such proclamation should be published by all possible means throughout the district. As far as possible the Governor should give instructions to the officer commanding the military. Civil magistrates should be warned that the proclamation gives them no extraordinary powers. Commanding officer to take the entire military authority. All officers to report as often as possible to him, and he to the Governor. Troops never, without urgent necessity, to be detached, except in command of a commissioned officer. All injury to non-combatants, women, and children, as far as possible to be avoided, and destruction of property. The Provost-Marshal, when appointed, to be limited by written order as to punishments. No punishments, unless trial impossible, without court-martial of at least three officers; and every reasonable facility for defence, and no sentence of death except by two-thirds of the court. Written records to be left." It will be seen that these instructions are in spirit and effect precisely what may be deduced from the principles laid down in the present work; and that, on the other hand, they necessarily imply the legality of the measures thus recommended.

which should be issued. It need not be pointed out how entirely this assumes and implies the doctrines which it has been the object of the Author to establish. And it will be seen, also, that the general tenor and effect of the Instructions which have been issued, is to embody and carry out those restraints and regulations which have been suggested in this work, as arising naturally and properly out of the principles upon which alone the legality of martial law can be properly upheld.

FINIS.

London: Printed by C. W. Stevens, 5, Great Queen Street, W.C.